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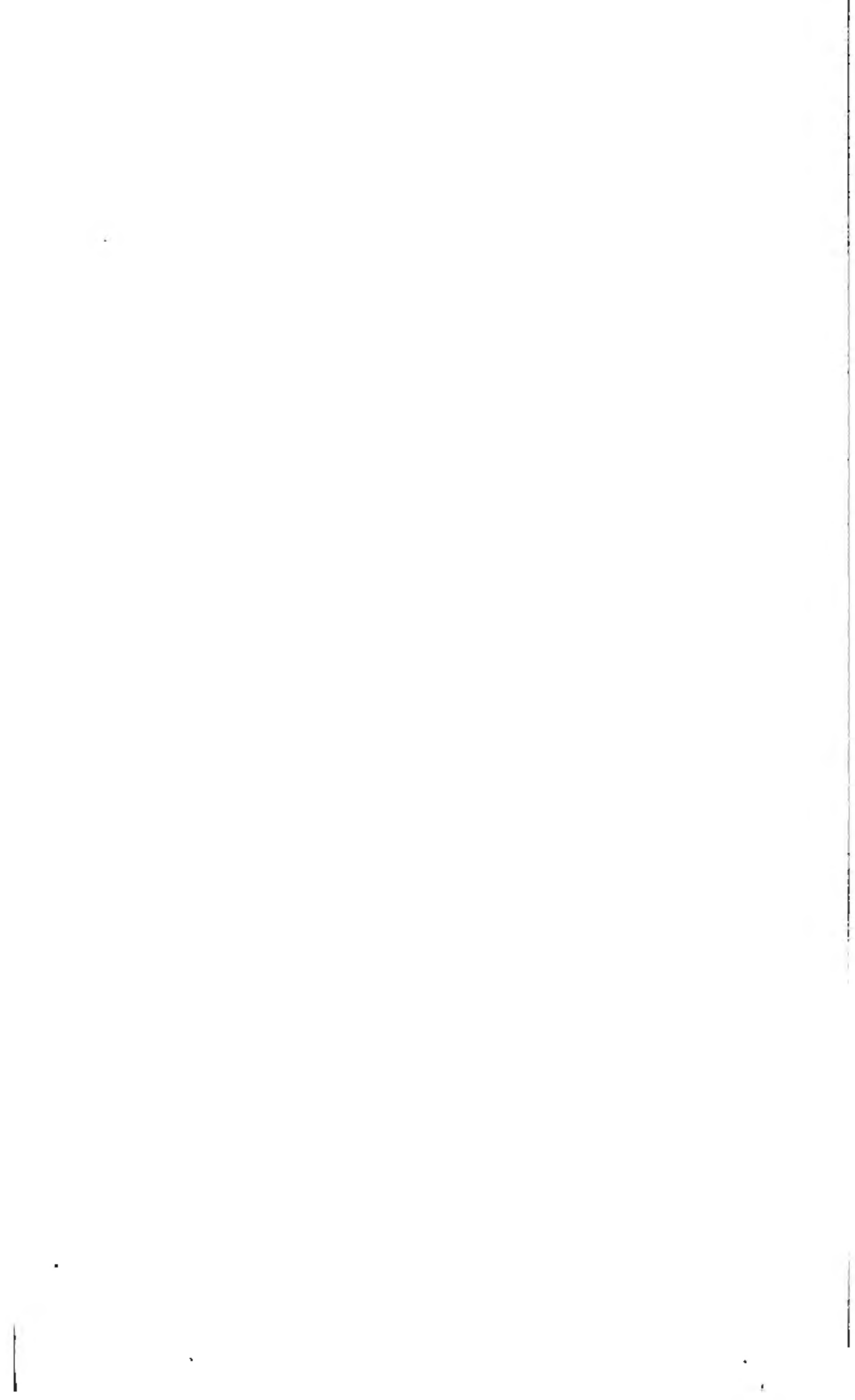
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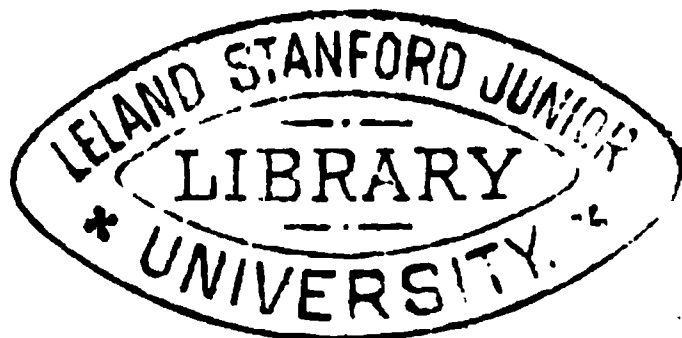
THE
AMERICAN AND ENGLISH
RAILROAD CASES.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN
AMERICA AND ENGLAND.

EDITED BY
WILLIAM M. MCKINNEY.

VOLUME XXXIII.

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GOODLETT

v.

LOUISVILLE AND NASHVILLE R. Co.

(122 United States 391.)

The Louisville and Nashville Railroad Company is a Corporation of Kentucky, and not of Tennessee, having from the latter State only a license to construct a railroad within its limits, between certain points, and to exert there some of its corporate powers.

When Case may be taken from the Jury. — Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved; and a case should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it.

THIS action was brought in the Circuit Court of Williamson County, Tenn., by Simon Callahan, to recover damages for personal injuries sustained by him while in the discharge of his duties as section-foreman on a railroad between Nashville, Tenn., and Decatur, Ala., which, at the time, was operated by the Louisville and Nashville Railroad Company. The declaration alleged that the defendant was a corporation created by the Legislature of Tennessee, and that the injuries complained of were caused by the negligence and carelessness of that company, its servants and agents. In due time the defendant filed its petition, accompanied by bond in proper form, for the removal of the action into the Circuit Court of the United States for the Middle District of Tennessee, alleging that the plaintiff was a citizen of Tennessee, and that the defendant was a citizen of Kentucky, having its principal place of business in that Commonwealth. The State court made an order recognizing the right of removal, and declaring that no further proceedings be had therein in said suit.

In the Circuit Court a motion to remand the cause to the State court — the ground of such motion being that the defendant was a corporation of Tennessee, and therefore a citizen of the same State with the plaintiff — was denied. To that action of the court an exception was taken.

Upon the trial of the case the court gave a peremptory instruction to find for the defendant. It also refused to give the

instructions asked in behalf of the plaintiff. The plaintiff sued out this writ of error.

F. E. Williams, at the argument of the case, submitted for plaintiff in error on his brief. *Mr. Bate* was with him on the brief.

Edward Baxter for defendant in error.

After argument the following order was made by the court, April 18, 1887.

Leave is granted counsel on both sides to file additional printed arguments on the third, fourth, fifth, and sixth assignments of error, at any time before Monday, May 2, if they desire to do so. It is the wish of the court that this be done.

F. E. Williams under this order submitted a brief for plaintiff in error.

HARLAN, J. — The first question presented by the assignments of error relates to the refusal by the court below to remand the action to the State court. If the defendant is a corporation of Kentucky, then its right to have the case removed from the State court cannot be denied.

Whether a corporation created by the laws of one State is also a corporation of another State within whose limits it is permitted, under legislative sanction, to exert its corporate powers, is often difficult to determine. This is apparent from the former decisions of this court. To some of those decisions it will be well to refer before entering upon the examination of the particular statutes of Tennessee, which, it is claimed, created the defendant a corporation of that State.

In *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 286, 293, 297, it was a question whether that company was not a corporation both of Indiana and Ohio. The company claiming in its declaration to be "a corporation created by the laws of the States of Indiana and Ohio, and having its principal place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio," sued *Wheeler*, a citizen of Indiana, in the Circuit Court of the United States for the district of Indiana. It was incorporated by an Act of the Legislature of Indiana. Subsequently the Legislature of Ohio passed an Act reciting the incorporation of the company in Indiana, and declared that "the corporate powers granted to said company by the Act of Indiana, incorporating the same, be recognized." At a later date the Legislature of Ohio passed an Act authorizing the extension of the company's road to Cincinnati, declaring that the intention of the previous Act "was to recognize, affirm, and adopt the charter of

Authorities examined. *Ohio & Miss. R. Co. v. Wheeler.*

the said Ohio and Mississippi Railroad Company, as enacted by the Legislature of the State of Indiana."

In the opinion of the court it is said "that a corporation by the name and style of the plaintiff appears to have been chartered by the States of Indiana and Ohio," and, therefore, that the company was "a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio."

In *Railroad Co. v. Harris*, 12 Wall. 65, 83, it appeared that the Baltimore and Ohio Railroad Company was incorporated by the State of Maryland for the purpose of securing the construction of a railroad from Baltimore to some suitable point on the Ohio River. Subsequently Virginia, by a statute which set out at large the Maryland Act, declared that "the same rights and privileges shall be and are hereby granted to the aforesaid company in the territory of Virginia, as are granted to it within the territory of Maryland;" the company to be subject to the same pains, penalties, and obligations as were imposed by the Maryland Act, and the same rights, privileges, and immunities being secured to Virginia and her citizens, except as to lateral roads. Congress, at a later date, passed an Act authorizing the company to extend its road into the District of Columbia, and to exercise "the same powers, rights, and privileges, and shall be subject to the same restrictions in the construction and extension of said lateral road into and within the said District, as they may exercise or be subject to under or by virtue of the said Act of incorporation in the construction and extension of any railroad in the State of Maryland," etc. Touching the question whether the legislation of Virginia and of Congress created a new corporation, this court said, "In both the original Maryland Act of incorporation is referred to, but neither expressly or by implication create a new corporation. The company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the consent of Virginia. That consent was given upon the terms which she thought necessary to prescribe. . . . The permission was broad and comprehensive in its scope; but it was a license, and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. Referring to *Ohio & Mississippi Railroad Co. v. Wheeler*, the court said, that, "as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company, licensed by Ohio, suing a citizen of Indiana in the Federal court of that State."

In *Railroad Co. v. Vance*, 96 U. S. 450, 457, an Act of the Illinois Legislature, referring to a lease made by the Indianapolis

and St. Louis Railroad Company, an Indiana corporation, of a certain railroad in Illinois, belonging to the St. Louis, Alton, and Terre Haute Railroad Company, an Illinois corporation, and declaring that "the said lessees, their associates, successors, and assigns, shall be a railroad corporation in this State, under the style of the Indianapolis and St. Louis Railroad Company, and shall possess the same or as large powers as are possessed by said lessor corporation, and such other powers as are usual to railroad corporations," was held not to be a mere license to an Indiana corporation to exert its corporate powers, and enjoy its corporate rights and privileges in Illinois, but to create the lessees, their associates, successors, and assigns, a distinct corporate body in the latter State. The court said, "It does more; it gives the style by which that corporation shall be known. Still further, it does not authorize the complainant corporation to exercise in Illinois the corporate powers granted by the laws of Indiana, but confers, by affirmative language, upon the corporation, which it declares shall be a railroad corporation in Illinois, 'the same or as large powers as are possessed' by an Illinois corporation, the St. Louis, Alton, and Terre Haute Railroad Company, and, in addition, such other powers as are usual to railroad corporations. The Indianapolis and St. Louis Railroad Company, as lessee of the St. Louis, Alton, and Terre Haute Railroad Company, was thus created, by apt words, a corporation in Illinois. The fact that it bears the same name as that given to the company incorporated by Indiana, cannot change the fact that it is a distinct corporation, having a separate existence derived from the Legislature of another State."

In *Memphis & Charleston Railroad Co. v. Alabama*, 107 U. S. 581, 584; s. c., 13 Am. & Eng. R.R. Cas. 172, the question was as to the citizenship of the corporation against which that suit was brought by the State of Alabama. The State of Tennessee, in 1846, created a corporation by the name of the Memphis and Charleston Railroad Company. The Legislature of Alabama subsequently passed an Act entitled "An Act to incorporate the Memphis and Charleston Railroad Company." That Act referred to the Act of the Tennessee Legislature, and granted to said company a right of way through Alabama, to construct its road between certain points named, declaring that it should have all the rights and privileges granted to it by the said Act of incorporation, subject to the restrictions therein imposed. The statute contained other provisions of the same general nature, from all of which, however, it was not, as this court observed, made quite clear, whether the company referred to in the body of the Act was the

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Alabama.**

one which the Act in its title purported to incorporate, or the one created by the Tennessee Act, and referred to in the preamble of the Alabama Act. But there were other sections expressly referring to the company "hereby incorporated," that is, incorporated by the Alabama Act. The whole of the latter Act, taken together, the court said, manifests the understanding and intention of the Legislature of Alabama that the corporation, which was thereby granted a right of way to construct through that State a railroad, "was, and should be, in law, a corporation of the State of Alabama, although having one and the same organization with the corporation of the same name previously established by the Legislature of Tennessee."

In the recent case of *Pennsylvania Company v. St. Louis, Alton, & Terre Haute Railroad Company*, 118 U. S. 290, 295, 296; s. c., 24 Am. & Eng. R.R. Cas. 58, the general question now before us received careful consideration. Penn. R. Co. v. St. Louis, etc., R. Co. It was there said, "It does not seem to admit of question that a corporation of one State, owning property and doing business in another State, by permission of the latter does not thereby become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi River to its eastern boundary, may, by permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line as one road by the permission of the State, without thereby becoming a corporation, or a citizen, of the State of Indiana. Nor does it seem to us that an Act of the Legislature conferring upon this corporation of Illinois by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred on it by the State which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation, which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence, under laws of another State, to exercise its functions in the State where it is so received. To make such a company a corporation of another State, the language used must imply creation, or adoption, in such form as to confer the power usually exercised over corporations by the State, or by the Legislature, and such allegiance as a State corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers."

So that the essential inquiry here must be, whether, within

the doctrine established in the cases we have cited, the State of Tennessee, by her legislation, granted a mere license to the Louisville and Nashville Railroad Company to exercise within her limits all or some of the powers conferred upon it by the State of Kentucky, or established a new corporation over which she could exert such direct control and authority as is usually exerted by a State over corporations of her own creation.

The essential inquiry.

The solution of this question depends upon the intent of the Legislature of Tennessee, as gathered from the words used in the statutes now to be examined.

We lay out of view the Acts of the General Assembly of Tennessee, approved Feb. 1, 1850, incorporating a company by the name of the Louisville and Nashville Railroad Company, and the Act of Feb. 9, 1850, entitled "An Act to incorporate the Nashville and Louisville Railroad Company." It appears in evidence that no organization was effected under those Acts, and we do not understand the counsel for the plaintiff to rely upon either of them as showing that the present defendant is a corporation of Tennessee.

Tennessee Acts laid out of view.

By an Act of the General Assembly of Kentucky, approved March 5, 1850, a corporation was created by the name of the Louisville and Nashville Railroad Company, with power to construct a railroad "from the city of Louisville to the Tennessee line, in the direction of Nashville;" and by an Act of the same body, approved March 20, 1851, authority was given to connect said road "with any railroad extending to Nashville, on such terms and conditions as the two companies may, from time to time, agree on, for the through transportation and travel of freight and passengers."

Kentucky Act incorporating Louisville and Nashville R. Co.

On the 4th of December, 1851, the General Assembly of Tennessee passed an Act, the title of which is "An Act to incorporate the Louisville and Nashville Railroad Company." As the question of citizenship depends mainly upon the construction of that Act, it is given in full, as follows:—

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the right of way for the construction of a railroad from the line between the States of Kentucky and Tennessee, so as to connect the cities of Louisville and Nashville by railroad communication, be, and is hereby, granted to the Louisville and Nashville Railroad Company, incorporated by the Legislature of Kentucky, with all the rights, powers, and privileges, and subject to all the restrictions and liabilities set forth and prescribed in a charter granted to said company by the Legis-

lature of Kentucky, and approved March the 5th, 1850, and the amendments thereto, passed by said Legislature, and approved March the 20th, 1851, for the term of nine hundred and ninety-nine years, except as further provided in this Act.

"SECT. 2. *Be it further enacted*, That said company shall construct said railroad from the boundary line between said States, beginning at said line where it shall be intersected by that part of said railroad which is to be within the State of Kentucky, to (a point within or convenient to) the city of Nashville: *provided*, That in the construction of said railroad said company shall commence at each end of the line at the same time, and continue the work from each end until said railroad is completed: *provided, further*, That said company shall not be compelled to use the capital stock subscribed and paid in by the citizens, companies, corporations, or counties in the State of Kentucky, in the construction of that part of said railroad lying in the State of Tennessee, until the part thereof lying in Kentucky is completed.

"SECT. 3. *Be it further enacted*, That so soon as said company shall have completed five miles of said railroad from Nashville, they may commence and prosecute their business, as provided in the twenty-first section of said charter; that the tariff of charges for transportation of passengers and for goods, wares, merchandise, and other articles and commodities, shall be equal on all parts of said railroad in proportion to distance; and that equal facilities for the transportation of the same in either direction shall be furnished.

"SECT. 4. *Be it further enacted*, That the stockholders in the State of Tennessee shall be entitled to be represented in said company by directors residing in Tennessee in proportion to their stock, to be chosen by the stockholders of the company in the manner and at the time the other directors are chosen.

"SECT. 5. *Be it further enacted*, That nothing in this Act, or in said charter or amendments thereto, shall be so construed as to prohibit the Legislature of Tennessee from passing any law authorizing the construction of railroads within this State, parallel to, crossing, or to unite with said railroad from Louisville to Nashville; and the State of Tennessee reserves the right so to do.

"SECT. 6. *Be it further enacted*, That the twentieth section of said charter, and the fourth section of the amendments thereto, shall be void, and of no force or effect within this State.

"SECT. 7. *And be it further enacted*, That the twenty-third, twenty-fourth, twenty-fifth, and twenty-ninth sections of the Act of the 11th December, 1845, incorporating the Nashville and Chattanooga Railroad Company, be, and are hereby, made a part

•

of the said charter of the Louisville and Nashville Railroad Company, to be in force within this State, and that this bill shall take effect from and after its passage: *provided*, That the Commonwealth of Kentucky shall grant to the State of Tennessee, or to such companies as the General Assembly may charter, the right of way from Nashville to intersect with the Lexington and Danville Railroad at Danville, Harrodsburg, or such other point on that road as the company may designate, provided it does not interfere with any vested rights of the citizens of Kentucky, with the like powers and privileges granted to this company.

"SECT. 8. *Be it further enacted*, That the company shall bring said railway to the city of Nashville, or South Nashville, and locate their depot convenient to the Nashville and Chattanooga Railroad, so as to form the connection."

Some stress is laid upon the title of that Act, as indicating a purpose to create a corporation, and not simply to recognize an existing one of another State, and invest it with authority to exert its functions within the State of Tennessee. While the title of a statute should not be entirely ignored in determining the legislative intent, it cannot be used "to extend or restrain any positive provisions contained in the body of the Act," and is of little weight even when the meaning of such provisions is doubtful. *Hadden v. Collector*, 5 Wall. 107, 110. Looking, then, at the body of the Tennessee Act of Dec. 4, 1851, we find no language clearly evincing a purpose to create a new corporation, or to adopt one of another State, in such form as to establish the same relations, in law, between the latter corporation and the State of Tennessee, as would exist in the case of one created by that State. The

Title of the Act
of little weight.

Tennessee Act
of Dec. 4, 1851,
did not create
new corpora-
tion.

Act grants to a named company "incorporated by the Legislature of Kentucky" a right of way, within designated limits, for the construction of a railroad, with all the rights, powers, and privileges, and subject to all the restrictions and liabilities, prescribed in its original and amended charter, "except as further provided in this Act." The remaining sections of the Act are, in form, additions and alterations of the charter of the Kentucky corporation; but, in effect, they only prescribe the terms and conditions upon which that corporation was given a right of way, and permitted to construct a railroad and exercise its powers, in Tennessee.

If the Legislature of the latter State intended to do any thing more than grant a license to a corporation of another State to construct a railroad, and exert its corporate functions within her limits; if it was intended to bring into existence a corporation subject to the paramount authority of Tennessee as were other

corporations created by her laws, — certain sections of the Act incorporating the Nashville and Chattanooga Railroad Company would not have been made a part of the charter of the Louisville and Nashville Railroad Company, to be in force simply “in this [that] State ;” but would have been incorporated into the company’s charter, to be in force wherever and whenever it exerted the powers granted to it. And the same observation applies to the proviso in the seventh section of the Act of Dec. 4, 1851, which requires that Kentucky should grant to Tennessee, or to such companies as the latter State might “charter,” the right of way from Nashville to intersect with a named road at certain points in Kentucky, with the like powers and privileges granted by Kentucky to the Louisville and Nashville Railroad Company.

Provisions in charter to be in force simply “in this State.”

Taking the whole of that Act together, we are satisfied that it was not within the mind of the Legislature of Tennessee to create a new corporation, but only to give the assent of that State to the exercise by the defendant, within her limits, and subject to certain conditions, of some of the powers granted to it by the State creating it.

No intention in Tennessee Legislature to create new corporation.

This construction is not, if indeed it could be, affected by the subsequent legislation of Tennessee. While the titles of the Acts of Jan. 10, 1852, Dec. 15, 1855, and March 20, 1858, give some slight support to the position taken by the plaintiff, the Acts themselves do not militate against the conclusions here expressed. In legal effect, they only impose other terms and conditions than those prescribed in the original Act, upon the exercise by the defendant, within Tennessee, of the powers and privileges conferred by its charter, as granted by Kentucky.

Subsequent legislation of Tennessee does not affect this construction.

Upon the authority of the cases cited, and for the reasons herein stated, we are of opinion that the Louisville and Nashville Railroad Company is a corporation of Kentucky, and not of Tennessee; and, consequently, that the action was removable, upon its petition and bond, into the Circuit Court of the United States.

• It only remains to consider the assignments of error relating to the charge to the jury, and to the refusal of the court to give certain instructions in behalf of the plaintiff. The bill of exceptions states, that, “on the trial of this cause, the following testimony was submitted to the jury.” Then follows the evidence of numerous witnesses for the respective sides, given in narrative form, and the charge of the court. The court, among other

Assignments relating to charge to jury. Refusal to give instructions.

things, charged the jury, that the plaintiff did not himself exercise reasonable care and prudence, but was guilty of negligence, so that had the people upon the train, or the persons controlled by him, been injured, they could have recovered against his employer for his negligence. "Under the facts proven in this case," the judge said, "were you to give a verdict against the defendant, I should feel bound to set it aside, and grant a new trial. In such a state of the case, it is my duty to instruct you to find a verdict for the defendant, and I accordingly do so, declining to give the instructions requested by plaintiff's counsel." The bill of exceptions does not, in express words, state that it contains all the evidence introduced at the trial.

Assuming, but without deciding, that the bill of exceptions sufficiently shows that all the evidence is embodied in the record, the question arises whether the court erred in withdrawing the case from the jury, and directing a verdict for the company. In *Phoenix Insurance Company v. Doster*, 106 U. S. 30, 32, it was said, that, "where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions, as to the principles of law involved;" and that a case should never be withdrawn from them, "unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." So, in *Randall v. Baltimore & Ohio Railroad Company*, 109 U. S. 478, 482; s. c., 15 Am. & Eng. R.R. Cas. 243, it was declared to be the settled law of this court, "that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

These authorities sustain the charge to the jury. The evidence makes a case of utter recklessness upon the part of the deceased, who was a section-boss of the defendant, charged with the duty of keeping its road in repair between certain points, so that trains could pass over it in safety. He was guilty of the grossest negligence in running his hand-car into the deep cut where he was injured, without having sent any one ahead to watch for and warn the passenger train, which he knew was approaching, or would soon reach that point on the road. But for his negligence in that respect, he would not have been injured.

It is said, however, that, despite any negligence to be fairly

When case
should be
withdrawn
from jury.

Charge to jury
to bring verdict
for defendant,
sustained.

imputed to the deceased, the agents of the company, who were in charge of the passenger train, might have avoided injuring him had they exercised reasonable diligence to that end. This position is supposed by counsel to be justified by §§ 1166, 1167, and 1168 of the Code of Tennessee, which provide, —

Statutory provisions relating to accidents to persons on track.

“SECTION 1298 (1166). Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

“SECT. 1299 (1167). Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur.

“SECT. 1300 (1168). No railroad company that observes, or causes to be observed, these precautions, shall be responsible for any damages done to person or property on its road. The proof that it has observed said precautions shall be upon the company.” — Code Tenn. 1884 (Milliken and Vertrees), §§ 1298–1300.

Without considering the question whether those sections are intended for the benefit of the general public only, not for the servants of the company, — especially one whose negligence caused, or contributed to cause, the accident, — it is sufficient to say, that the court below correctly held that the requirements of the Tennessee Code were complied with by the company, so far at least as the circumstances attending the injury of the deceased are concerned. A verdict based upon a different view of the evidence should have been set aside, upon motion by the defendant.

Same were complied with by company.

The jury having been properly directed, in view of all the evidence, to find a verdict for the company, it is unnecessary to consider the exceptions taken to its refusal to grant certain instructions asked in behalf of the plaintiff. The judgment is affirmed.

Domicil of Corporations. — See *Newport, etc., B. Co. v. Woolley*, 7 Am. & Eng. R. R. Cas. 18; *California So. R. Co. v. Southern Pacific R. Co.*, 17 Ib. 172.

When Corporation is chartered by several States, it is a Citizen of each. — *Home v. Boston, etc., R. Co.*, 12 Am. & Eng. R. R. Cas. 287; *Stone v. Farmers' L. & T. Co.*, 23 Ib. 577; *Central R. & B. Co. v. Carr*, and note, 23 Ib. 487–492; *Graham v. Boston, etc., R. Co.*, and note, 25 Ib. 53–67 *et seq.*

And Railway acting upon Authority of Statute enacted by another State, may become a Corporation of that State. — *Graham v. Boston, etc., R. Co.*, 25 Am. & Eng. R.R. Cas. 53.

But Railway extending its Line into Foreign State by Permission of Legislature does not thereby become a Citizen of such State. — *Penn., etc., R. Co. v. St. Louis, etc., R. Co.*, 24 Am. & Eng. R.R. Cas. 58.

Dow

v.

MEMPHIS AND LITTLE ROCK R. Co.

(124 *United States Reports*, 652.)

Mortgage covering Income. Accounting by Mortgagor. — Where a railroad mortgage covers income, the mortgagor is not bound to account to the mortgagee for earnings while the property is in his possession, until a demand is made therefor, or for a surrender of possession under the mortgage; but the commencement of a suit in equity to enforce a surrender of possession to the trustees under the mortgage in accordance with its terms is a demand for possession, and if the trustees are then entitled to possession the company must account from that time.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

U. M. Rose for appellants.

Wager Swayne for appellees.

WAITE, C. J. — The facts on which this case rests are these: Robert K. Dow, Watson Matthews, and Charles Moran are the trustees in two mortgages executed by the Memphis and Little Rock Railroad Company, as re-organized, one on the 1st and the other on the 2d of May, 1877, to secure two separate issues of bonds. Each of the mortgages covered, among other things, "all the incomes, rents, issues, tolls, profits, receipts, rights, benefits, and advantages had, received, or derived by the party of the first part from any of the hereby conveyed premises," which included the railroad of the company; but it was provided that until default in the payment of interest or principal the company should "retain the possession of all the property hereby conveyed, and receive and enjoy the income thereof." In case of default for sixty days in the payment of interest, the trustees were authorized to enter upon and take possession of "all and singular the charter, franchises, and property . . . conveyed," "and take and receive the

income and profits thereof." The company failed to pay its interest falling due July 1, 1882, and thereafter. For this reason the trustees began this suit against the company in the Circuit Court of the United States on the 12th of February, 1884, praying that they might be put into the possession of the mortgaged property in accordance with the terms of the mortgage of May 2, 1877, and for the purposes therein expressed, "and that the defendant may be enjoined from interfering with their possession, or disturbing it in any way." On the 24th of March they applied for the appointment of a receiver; and the court, on the 27th of that month, granted the parties until April 7th to file briefs on the motion, but ordered "that the defendant, until further order herein, hold the property mentioned in the bill subject to the order of the court." On the 15th of April a receiver was appointed, and the company was ordered at once to "surrender possession of its said railroad, rolling stock, and all other money and property of every character" to him. To this order exceptions were taken by the company, so far as it directed the delivery of money to the receiver, on the ground "that all the money in its hands or possession was derived by it from the operation of the railroad, and other property mentioned in the bill, and was its income and the income of said property, and that it had no money whatever, save such as was thus derived and received;" and that at no time had the plaintiff demanded possession of the property. On the 18th of April this motion was denied, but the receiver was directed to hold the moneys to be paid him, "subject to the order of the court, and to be repaid to defendant should the court so adjudge." On the 27th of March the company had in its hands \$42,123.68. Between that date and April 15 the company paid out \$46,458.16, and its earnings were such that, when added to the \$42,123.68, there was enough to make these payments, and leave a balance of \$32,216.20, which was paid over to the receiver.

Certain persons who were holders of bonds secured by the mortgage of May 1, 1877, recovered judgments at law against the company for past-due coupons, amounting in the aggregate to more than the sum thus put in the hands of the receiver, and they presented petitions for payment out of the fund. Afterwards the court ordered the receiver to pay back the \$32,216.20 to the company, and to turn over the mortgaged property to the trustees. The record does not show that there are any other creditors than such as are secured by the mortgages, which exceed in amount the value of the property. From that part of the decree directing the restoration of the money to the company, the trustees took this appeal. The creditors who presented petitions for the payment of their judgments did not appeal, so

that the only question presented here is whether the court erred in ordering the receiver to pay the \$32,216.20 to the company instead of the trustees.

It is well settled that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the

Company must account from time of commencing suit. mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in *Railroad v. Cowdrey*, 11 Wall. 459, 483.

In the present case a demand was made for the possession by the bringing of this suit, Feb. 12, 1884; and from that time, in our opinion, the company must account. The bill was not filed to foreclose the mortgage, but to enforce a surrender of possession to the trustees in accordance with its terms. The court below decided that the trustees were entitled to the possession when the suit was begun, and from the decree to that effect no appeal has been prosecuted. We must assume, therefore, that the demand was rightfully made, and ought to have been granted. It follows, that, after the suit was begun, the company wrongfully withheld the possession; and under such circumstances equity forbids that it should retain, as against the mortgagee, the fruits of its refusal to do what it ought to have done. It is a matter of no consequence that a receiver was not appointed until April 15, or that an application was not made for such an appointment until March 24. If the surrender of possession had been made, as we must assume it ought to have been, as soon as the suit was begun, a receiver would have been unnecessary. All that was done afterwards in that particular was in aid of the suit, and because of the refusal of the company to comply with the demand that had been made. It follows that from the time of the bringing of the suit the company itself is to be treated in all respects as a receiver of the property, holding for the benefit of whomsoever in the end it should be found to concern, and liable to account accordingly. In *Railroad v. Cowdrey*, before cited, the controversy was in respect to earnings before suit brought, and the suit was for foreclosure only, the court being careful to say, in its opinion, that it did not "appear that the complainants, or their trustees, made any demand for the tolls and income until they filed the present bill," and that "the bill itself did not contain any allegation of such a demand."

It remains only to inquire when the money, which is the subject-matter of the controversy, was actually earned; and we have no hesitation in deciding, upon the evidence, that it must have been after the suit was begun. The admission is, that, on the

27th of March, the amount in the hands of the company was \$42,123.68. Between that date and April 15 the company paid out \$46,458.16, which was \$4,334.48 in excess of what it had on hand at the beginning. On the 15th of April it had on hand \$32,216.20, thus showing that its earnings from March 27 until then must have been \$36,550.68. The fair inference from the evidence is, that the receipts were all from the current earnings, and the disbursements for the current expenses. The railroad was all the time, before and after the suit, a "going concern," and its receipts and disbursements the subjects of current income account. Applying the disbursements as they were made from the income to the payment of the older liabilities for the expenses, as is the rule in ordinary running accounts, it is clear, that, in the absence of proof to the contrary, the money on hand was earned pending the suit. Under these circumstances, as there are no current-expense creditors claiming the fund, we are satisfied that the money is to be treated as income covered by the mortgages, and should be paid to the trustees, to be held as part of that security.

Money earned
after suit
begun.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to enter a decree in accordance with this opinion.

Rights of Holders of Income Mortgage Bonds to Restrain Application of Income to other Purpose than Payment of Bonds.—The bonds held by plaintiffs were "income mortgage bonds," issued by defendant under a special Act passed in 1880 (Chap. 73, Laws of 1880). Only the principal of these bonds was secured by the mortgage. The payment of interest was subject to the condition, that "the net earnings of the railroad and other property of the company for each period," i.e., each year, should be sufficient to pay it; the amount of net earnings for each period to be determined by defendant's board of directors, by the coupons. The company promised to pay the sum named, "or so much thereof as its net earnings for the year then ending, according to the terms of the bond, will pay." The property mortgaged included all the property, franchise, income, and profits, and all "privileges, rights," etc., and all rolling-stock and other property, "now owned, or hereafter to be owned, or acquired, by said company." By the terms of the mortgage it was subject to the right of the mortgagor "to retain the free and uncontrolled use, enjoyment, possession, and management" of the mortgaged property, so long as no default was made in payment, in accordance with the terms of the bonds. The mortgage stated that it was given primarily to secure certain bonds described as "first consolidated mortgage bonds of the company;" and, secondarily, the payment of the principal, but not the interest of the "income mortgage bonds." It is also further provided, that whenever the mortgagor acquired any franchises, or "property or interests of any name or nature, for the use of, or in connection with, its railroad," they should be held subject to the lien of the mortgage. It was claimed on behalf of plaintiffs, that the income of defendant was charged with the payment of plaintiffs' bonds, and could not be applied upon any contract subsequently entered into until the charge was extinguished; that the net earnings were insufficient to meet the accruing interest on the income bonds, and if diverted for the

purpose of carrying out a lease, would be absorbed. *Held*, that, so far as the interest was concerned, plaintiffs were simply contract creditors, having no lien or right other than to have it paid out for the proper fund, i.e., "the net earnings;" that the power of the company to change the condition of the road by additions, extensions, or improvements, consistent with the purposes of its incorporation, was not restricted by the provisions referred to; that the parties contemplated a line of active and efficient railroad, managed in the usual manner according to the discretion of defendant's directors, not one in suspense or liquidation; and that, therefore, the directors had the right to use the earnings of the corporation for such improvements or other lawful purposes in its business as they might think best, and plaintiffs were not entitled to maintain the action. *Day v. Ogdensburg, etc., R. Co.*, 107 N. Y. 129.

ST. LOUIS, ALTON, & TERRE HAUTE R. CO.

v.

CLEVELAND, COLUMBUS, CINCINNATI, & INDIANAPOLIS R. CO.

(125 *United States Reports*, 658.)

Mortgage. — Foreclosure. — Priority of Claims. — The rule charging operating expenses of a railroad, debts due from it to connecting lines growing out of an interchange of business, debts due for the occupation of leased lines; and generally, debts created under special circumstances which make an equity in favor of the unsecured debtor, upon the gross income of the road before a fund arises for the payment of mortgage interest, is not applicable to a fund realized from a sale of the road under foreclosure of a mortgage; and, as a general rule, unsecured debts of the company cannot, in such case, take precedence over debts secured by prior and express lines, in the distribution of the proceeds of the sale of the mortgaged property.

Earnings Applicable to Payment of Rent. — Diversions to Payment of Interest. — The court holds on the proof in this case: (1) that no gross earnings which should have been applied to the payment of the rent due the appellant, were diverted to the payment of interest upon bonds of mortgage bondholders represented in this suit, and interested in the distribution of the fund; and (2) that the appellant has no equitable right, as against the appellees, to priority of payment out of the fund.

APPEAL from the Circuit Court of the United States for the District of Indiana.

In equity. Petition of appellant, the St. Louis, Alton, & Terre Haute Railroad Company, against the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company, John H. Devereux, receiver of the Indianapolis and St. Louis Railroad Company, and the Pennsylvania Railroad Company.

The decree appealed from in this case was rendered upon an intervening petition of the St. Louis, Alton, & Terre Haute

Railroad Company, filed Oct. 30, 1882, in a suit then pending in the Circuit Court of the United States for the District of Indiana, wherein Hinman B. Hurlbut was complainant, and the Indianapolis & St. Louis Railroad Company defendant; the object of which suit was to foreclose the second and third mortgages, in which Hurlbut was the surviving trustee, upon the railroad and other property of the defendant. A decree of foreclosure and sale had been rendered therein on May 22, 1882, in pursuance of which the mortgaged premises were sold on July 28, 1882, for the sum of \$1,396,000, subject to the outstanding first mortgage; and, at the date of the filing of the intervening petition of the present appellant, they had become by purchase the property of the Indianapolis & St. Louis Railway Company. The proceeds of the sale were under the control of the court for purposes of distribution; and the matter had been referred to a master in chancery to hear evidence in support of the claims of any creditor claiming the right to share in that distribution, and to make report thereon. The petition alleges, and it so appears, that by a decree of the Circuit Court of the United States for the District of Indiana, rendered July 26, 1882, in a certain suit in equity, in which said petitioner was complainant, and the said Indianapolis & St. Louis Railroad Company and others were defendants, he obtained a decree against said Indianapolis & St. Louis Railroad Company for the payment of the sum of \$664,874.70, besides costs, which decree remains unsatisfied and unreversed. This amount, it is claimed by the petitioner, is a lien upon the proceeds of the sale of the Indianapolis & St. Louis Railroad, prior in equity to that of the bondholders secured by the second and third mortgages. The indebtedness for which this decree was rendered arose under an agreement entered into between the petitioner and the Indianapolis & St. Louis Railroad Company on Sept. 11, 1867, whereby it was provided that the Indianapolis & St. Louis Railroad Company should manage, operate, and carry on the business of that portion of petitioner's road known as its principal or main line, extending from Terre Haute, in the State of Indiana, to East St. Louis, in the State of Illinois, a distance of 189 miles, and of the Alton branch thereof, extending from Alton Junction, in the State of Illinois, to Alton, in said State, a distance of 4 miles, for the period of 99 years from the first day of June, 1867; that said Indianapolis & St. Louis Railroad Company should pay annually during said term to the petitioner 30 per cent of the gross earnings of the said main line and Alton branch until such gross earnings for the year should amount to \$2,000,000, and 25 per cent of any excess over \$2,000,000, until the whole earnings for the year should amount to \$3,000,000, and 20 per cent of any

excess over \$3,000,000 of gross earnings for such year; and, further, that the said payment should amount in each and every year to at least the sum of \$450,000, which amount was agreed upon as a minimum rental, to be paid absolutely without reference to the percentage which it formed of the gross earnings of any year, and without leaving or creating any claim or charge upon the earnings of any future year. The petition further shows, that, at the time of the execution of the said operating contract, the Indianapolis & St. Louis Railroad was not built, and that the Indianapolis & St. Louis Railroad Company was organized and created for the express purpose of furnishing to the Cleveland, Columbus, Cincinnati, & Indianapolis Railroad Company and the Pittsburg, Fort Wayne, & Chicago Railway Company a through line to the Mississippi River by means of its connection with the petitioner's road, the St. Louis, Alton, & Terre Haute Railroad, under the foregoing contract; and that, while the Indianapolis & St. Louis Railroad Company nominally under that contract was the lessee of the petitioner's road, yet in fact it was leased and operated for the benefit of the other two companies named, who furnished the money to build the said Indianapolis & St. Louis Railroad, and who entered into a contract with the petitioner, guaranteeing performance of said agreement on the part of the Indianapolis & St. Louis Railroad Company, and who had entered into a contract between themselves for the management and operation of the continuous line of railroad from Indianapolis, in the State of Indiana, to East St. Louis, in the State of Illinois, including the Indianapolis & St. Louis Railroad and the petitioner's road. It was further alleged in the petition, that the Pennsylvania Railroad Company, which, together with the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company, are made defendants to the petition, had succeeded to the rights and obligations under these several contracts and arrangements of the Pittsburg, Fort Wayne, & Chicago Railway Company; and that the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company were equal owners of the capital stock of the Indianapolis & St. Louis Railroad Company, and that the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company is the holder, substantially, of all the second-mortgage bonds of the Indianapolis & St. Louis Railroad Company. The petition further alleges that the eastern terminus of the St. Louis, Alton, & Terre Haute Railroad is the western terminus of the Indianapolis & St. Louis Railroad, the two thus forming a continuous line from Indianapolis to East St. Louis on the Mississippi River, the road of the petitioner being the only outlet for the Indianapolis & St. Louis Railroad west of Terre Haute; that a very large pro-

portion of the earnings of the Indianapolis & St. Louis Railroad Company are derived from business received by it from the petitioner's leased line; and avers that the earnings of the leased road over and above the amount authorized to be retained by the Indianapolis & St. Louis Railroad Company for the purpose of operating the same at all times have been and are the property of the petitioner. The petitioner further claims, that the rental for the use and occupation of said continuous line constituted a part of the operating expenses of the Indianapolis & St. Louis Railroad Company; that the operating contract was executed before any of the bonds of the Indianapolis & St. Louis Railroad Company were issued and sold; that it was the duty of the Indianapolis & St. Louis Railroad Company to pay all of its operating expenses, including the rental of the petitioner's road, out of its earnings before it paid any interest on said bonds; but that the said Indianapolis & St. Louis Railroad Company, instead of paying its operating expenses as thus defined, diverted and appropriated its earnings to improvements of its property in better equipment and new construction, and to the payment of interest upon its bonds, and neglected and refused to pay the rental accruing to the petitioner for which it had obtained a decree, as above stated. And the petition alleges that during the time the Indianapolis & St. Louis Railroad Company has been in possession of the petitioner's road the amount of such misappropriation and diversion of funds, that should have been applied to the payment of operating expenses, amounts to the sum of \$1,000,000. The petition further shows, that on May 1, 1878, the Indianapolis & St. Louis Railroad Company made default in the payment to petitioner of the rental then due under the terms of said contract, and so continued to make default from and including April 1, 1871, up to and including Oct. 26, 1878, during which time it was in possession and use of the leased road, receiving the profits and income thereof, and paid over no part of the gross earnings of said road to the petitioner whatever, but appropriated the whole of the same to its own use, thirty per cent whereof during said time amounted to the sum of \$164,052.82, which, it is alleged, was appropriated by the Indianapolis & St. Louis Railroad Company to improvements, betterments, and new construction upon its own line of railroad, in the purchase of rolling stock and equipment, and in the payment of interest upon its bonds. It is further alleged in the petition, that when the Indianapolis & St. Louis Railroad Company took possession of the leased road in 1867, it received from the petitioner supplies of the value of \$91,860.05, which, by the terms of the lease, the lessee contracted and agreed to return or account for to the lessor at the termination

of the lease ; that said supplies have long since been consumed by the lessee ; that by the terms of the decree and sale in the principal cause the lease has been assigned and transferred to the Indianapolis & St. Louis Railroad Company ; and it is claimed that said amount is a charge upon the proceeds of the sale of the leased road in the possession of the court for distribution. The petition therefore prays for a decree awarding priority in payment in its favor out of the proceeds of the sale of the two sums of \$664,874.70 and \$91,860.05. To this petition answers were filed by the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company, and by the Pennsylvania Railroad Company, in which the allegations of the petition in regard to the diversion of the earnings of the St. Louis, Alton, & Terre Haute Railroad Company to the purposes of the Indianapolis & St. Louis Railroad are denied, as well as the general equity set up by the petitioner. On June 27, 1884, the cause having been fully heard upon the petition, and the answers and proofs, a final decree was rendered awarding to the petitioner an amount found due to it for rental accrued while the road was in the possession of the receiver appointed under the foreclosure proceedings, and directing payment thereof ; but so far as the petition sought to establish a claim for rental prior to the date when the receiver took possession of the property, as against the proceeds arising from its sale ; and so far as it sought to recover the value of the supplies turned over to the Indianapolis & St. Louis Railroad Company in 1867, at the time of the execution of the lease, the petition was dismissed. It is from that decree that this appeal is prosecuted.

J. E. McDonald and John M. Butler for appellant.

S. Burke and John T. Dye for appellees.

MATTHEWS, J. — At the time of the execution of the lease in 1867 of the St. Louis, Alton, & Terre Haute Railroad to the Indianapolis & St. Louis Railroad Company, the railroad of the latter company was not in existence. It was subsequently constructed in order to form the connection which would give to the parties in interest the desired through line from Indianapolis to St. Louis. The capital stock of the Indianapolis & St. Louis Railroad Company was owned substantially by the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati, & Indianapolis Railroad Company in equal parts. A portion of the funds necessary to construct and equip the road was represented by bonds secured by mortgages. Of these there were three : the first mortgage was for \$2,000,000, the second for \$1,000,000, and the third for \$500,000. The first-mortgage bonds, prior to the foreclosure and sale, had been sold

in the market, and were outstanding. The sale was made subject to the continued incumbrance of that mortgage, and of the bonds secured thereby. The holders of these bonds have, therefore, no interest in this controversy. The second and third mortgage bonds were originally taken to account by the two companies interested in the construction of the road; but prior to the foreclosure and sale had become substantially the property of the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company, that company having acquired the entire interest of the Pennsylvania Railroad Company. As the owner of these bonds, the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company claims to be entitled to the whole amount of the proceeds of the sale of the road under the foreclosure, and is the only party in interest adverse to the petitioner. The default in the payment of interest on the second and third mortgages dates from Jan. 1, 1878. The decree of foreclosure finds the amount of interest in arrears on May 2, 1882, on the second-mortgage bonds, to be \$291,745.97, and the aggregate sum due on account of said mortgage, principal and interest, to be \$1,197,745.97, with interest from May 2, 1882. The amount found due by the same decree, on account of the bonds secured by the third mortgage, including interest from Jan. 1, 1878, is \$699,164.76. The whole amount found due by the decree, including both sums, is \$1,896,910.73, which is more than the amount of the proceeds of the sale of the road, which were \$1,396,000. Upon the bill of Hinman B. Hurlbut, as trustee, for the foreclosure and sale of the Indianapolis & St. Louis Railroad property, a receiver was appointed, and it was ordered that the St. Louis, Alton, & Terre Haute Railroad Company should be entitled to require the payment of 30 per cent of the gross earnings of its railroad to said lessor, according to the order of the court theretofore made and still in force in the suit of the St. Louis, Alton, & Terre Haute Railroad Company against the Indianapolis & St. Louis Railroad Company, with the terms of which order the receiver was directed to comply. The order appointing the receiver also expressly reserved to the court the right and power to make such orders and decrees, touching the payment of the debts of the Indianapolis & St. Louis Railroad Company incurred in the management and operation of its railroad prior to the appointment of the receiver, as might be equitable and just. The decree of foreclosure and sale also contained a clause reserving to the court the right by subsequent order or orders to distribute the proceeds of the sale of the railroad and property connected therewith, and to make such further order and decree in regard to the distribution of the proceeds of sale as might to the court seem equitable and just; and a refer-

ence was made to the master to hear evidence in support of all claims or indebtedness in behalf of any creditor of the defendant company, whether secured or not. The Indianapolis & St. Louis Railroad Company, from the date of the lease in 1867, continued to pay to the St. Louis, Alton, & Terre Haute Railroad Company the rental reserved by the terms of the lease; viz., 30 per cent of the gross earnings of the leased road in each year until April 1, 1878. Prior to that time there had been no default in respect to the payment of the full amount of the rental as it accrued. The lessee ceased paying rent from that date. On Oct. 25, 1878, the St. Louis, Alton, & Terre Haute Railroad Company filed its bill in equity in the Circuit Court of the United States for Indiana against the Indianapolis & St. Louis Railroad Company, to which also the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company and the Pennsylvania Railroad Company were made parties defendant. The object of that bill was specifically to enforce the performance of the covenants contained in the lease on the part of the lessee and of the other defendants as guarantors. It was in that suit that the order was made Nov. 30, 1878, requiring the Indianapolis & St. Louis Railroad Company to pay into court, on account of the rental due the lessor, monthly, on the fifteenth day of each month, 30 per cent of the gross earnings, for the preceding month, of the leased road, calculating the gross earnings which had accrued since Oct. 26, 1878. The final decree of the Circuit Court in that cause declared that the lease and operating contract of Sept. 11, 1867, was a valid obligation upon all the parties thereto, and established the amount of the indebtedness of the Indianapolis & St. Louis Railroad Company on account of the minimum rent reserved by said lease to July 1, 1882, at the sum of \$541,358.23 principal, and \$123,516.47 interest, making in all the sum of \$664,874.70. It also found that 30 per cent of the gross earnings of the leased line collected and received by the Indianapolis & St. Louis Railroad Company, and withheld by it from April 1, 1878, until Oct. 26, 1878, amounted to \$164,052.82, which was part of said aggregate amount found due. The decree further declared the liability of the Pennsylvania Railroad Company and of the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company as guarantors for their proportion of the said sum, and awarded payment accordingly. From this decree appeals were taken and prosecuted to this court by the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company, the judgment in which was rendered at October term, 1885, and is reported in 118 U. S. 290; s. c., 24 Am. & Eng. R.R. Cas. 58. It was there decided that the lease of 1867 was void for want of power on the

part of the Indianapolis & St. Louis Railroad Company to enter into it, and that the guaranty of performance executed by the other defendant companies, by reason thereof, was also void. The decree of the Circuit Court was accordingly reversed, and the cause remanded with directions to dismiss the bill as to the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company; but that part of the decree which required the Indianapolis & St. Louis Railroad Company to pay the amount found due as rent was left standing, as no appeal from it had been prosecuted by the Indianapolis & St. Louis Railroad Company. Pending that litigation, the intervening petition of the St. Louis, Alton, & Terre Haute Railroad Company, now under consideration, was filed in the foreclosure suit, in which Hurlbut, as trustee, was complainant. The propositions on which counsel for the appellant bases its right to the relief prayed for in the intervening petition, and which was denied by the decree, are stated by it as follows: *First*, That the petitioner is in equity entitled to just and fair compensation for the use of its railroad, equipment, and franchises as upon *quantum meruit*, even if the lease is entirely disregarded. *Second*, That the minimum rent of \$450,000 per annum, in monthly payments of \$37,500, is no more than just, fair, and equitable compensation for the use of the leased line upon *quantum meruit*. *Third*, That the petitioner is entitled to payment of the \$664,874.70 decreed, due it by the decree of July 20, 1882, with interest thereon, out of the proceeds of the sale of the railroad and property of the Indianapolis & St. Louis Railroad Company in preference to payment of the mortgage bonds: (1) Because it is an unpaid operating expense of the Indianapolis & St. Louis Railroad Company, there having been gross earnings abundant to pay all operating expenses, including rent of the leased line; (2) because it is a debt justly due to the petitioner as a connecting line; (3) because gross earnings lawfully applicable only to operating expenses, until every operating expense has been fully paid, have been diverted to the benefit of the bondholders of the petitioner in payment of bond interest, and in adding increased value to the mortgaged property by additions and improvements, to an amount sufficient to have paid the debt now due to the petitioner many times. *Fourth*, That the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company, in resisting payment of the debt due the petitioner in preference to the payment of the second and third mortgage bonds, does not stand before a court of equity in the position of simply an ordinary bondholder; and that the peculiar relations existing between the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company and the

Propositions
on which
appellant bases
his right to
relief.

Indianapolis & St. Louis Railroad Company, as disclosed by this litigation, greatly strengthen the equity in favor of the petitioner in its claim for preference in payment over the mortgage bonds.

Fifth, That the petitioner is entitled to payment of \$164,052.82, with interest thereon from Oct. 26, 1882, out of the proceeds of sale, because that amount is 30 per cent of the gross earnings earned on the track of the leased line from April 1, 1878, to Oct. 26, 1878, and is trust money reserved by the lease, belonging to the petitioner, collected, withheld, and wrongfully appropriated to its own use and benefit by the Indianapolis & St. Louis Railroad Company. It may be admitted that the petitioner is entitled in equity to a just and fair compensation for the use of its railroad by the Indianapolis & St. Louis Railroad Company, without regard to the lease, as between it and the lessee, and also that the minimum rent of \$450,000 per annum, in monthly payments of \$37,500, is no more than that just and fair compensation that the lessor company would be entitled to receive for the use of its road upon a *quantum meruit*. As between the petitioner and the Indianapolis & St. Louis Railroad Company, the amount of the indebtedness on that account is conclusively established by the decree of July 26, 1882, which, as between these parties, stands unreversed and unsatisfied.

A different question, however, arises as between the petitioner and the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company as the owner of the mortgage bonds, for the satisfaction of which the Indianapolis & St. Louis Railroad has been sold. It remains as between these parties, for the petitioner to establish that the debt to it of the Indianapolis & St. Louis Railroad Company, on account of this use and occupation, is a prior lien and charge upon the proceeds of the sale of the Indianapolis & St. Louis Railroad, entitled to preference over that of the second and third mortgages. Among the reasons urged in support of this preference are these: because the arrearage is an unpaid operating expense of the Indianapolis & St. Louis Railroad Company; because it is a debt due to the petitioner as a connecting line; and because it consists of a portion of the gross earnings earned on the track of the leased line received by the Indianapolis & St. Louis Railroad Company, and held by it as trust money in equity belonging to the petitioner. This last reason, as formally presented, is limited to \$164,052.82, being thirty per cent of the gross earnings earned on the track of the leased line from April 1, 1878, to Oct. 26, 1878, but is applicable as well to all other amounts received by the lessee of the gross earnings of the leased line which have not been accounted for. But none

Priority of
petitioner's
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ceeds of sale of
Indianapolis
& St. L. R.
Reasons for
preference.

of these reasons, standing by themselves, are sufficient. It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines, are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on mortgage bonds. But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its *corpus*; and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens. There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens. Illustrations and instances of these cases are to be found in *Fosdick v. Schall*, 99 U. S. 235; *Miltenberger v. Railroad Co.*, 106 U. S. 286; s. c., 12 Am. & Eng. R.R. Cas. 464; *Trust Co. v. Souther*, 107 U. S. 591; s. c., 11 Am. & Eng. R.R. Cas. 707; *Burnham v. Bowen*, 111 U. S. 776; s. c., 17 Am. & Eng. R.R. Cas. 308; *Trust Co. v. Railroad Co.*, 117 U. S. 434; *Dow v. Railroad Co.*, 124 U. S. 652; *ante* 12; *Sage v. Railroad Co.*, 125 U. S. 361; and *Trust Co. v. Morrison*, 125 U. S. 591; s. c., *infra*. The rule governing in all these cases was stated by Chief-Justice Waite in *Burnham v. Bowen*, 111 U. S. 776, 783; s. c., 17 Am. & Eng. R.R. Cas. 308, as follows: "That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all. Admitting, therefore, that the reasonable rent of the leased line accruing to the petitioner was a proper charge upon the gross income of the Indianapolis & St. Louis Railroad Company, as a part of its current operating expenses, before any net income could arise applicable to the payment of the interest on the mortgage bonds, it must still be shown, to entitle the petitioner to the relief prayed for, that the arrearage due on account thereof has arisen by the diversion and misappropriation of the fund that ought to have been applied to its payment to the use and benefit of the mortgage bondholders. Counsel for the petitioner

How arrearage
due on account
of mortgage
bonds accrued.

undertake to do this, and insist that upon the proofs in this case it satisfactorily appears that such a diversion and misappropriation have taken place to its injury, and to the advantage and benefit of the bondholders claiming the fund in court for distribution. This diversion and misappropriation are alleged to have occurred in two ways: (1) By the payment of the interest on the mortgage bonds out of earnings which should have been paid to the petitioner on account of rent due to it as an operating expense; and (2) by the application of earnings to permanent improvements and betterments of the Indianapolis & St. Louis Railroad property, which have increased the value of that property as a mortgage security; an increased value, which, it may be very fairly presumed, is represented in the proceeds of its sale. The fact in issue, it is claimed, is shown by an exhibit, which in tabular form contains a statement of the earnings, expenses, rental, and interest on bonds of the Indianapolis & St. Louis Railroad Company, including the leased line as one of its divisions, from the date of the commencement of operations under the lease in 1867 to May 23, 1882. That statement shows: Gross earnings, \$26,868,252.31; operating expenses, including taxes, \$19,417,078.26; leaving as net earnings, \$7,415,174.05. During the same period the amount of rental paid for the leased lines was \$6,464,869.19, and during the same period interest paid on bonds, \$2,234,396.62, showing as the result of the operations for the entire period a deficit of \$1,248,091.76. It thus appears that the payments made on account of the various items mentioned exceed by that sum the entire gross earnings received by the lessee from its own and the leased line. But inasmuch as during this period \$2,234,396.62 out of the gross earnings were paid on account of interest on bonds, being \$986,304.86 more than the entire apparent deficit, the inference is drawn that the deficit has arisen in consequence of the payment of interest on bonds, more than sufficient, if they had been so appropriated, to have paid the entire rental, including the arrearage now due. This, it is claimed, establishes the fact to be proved, that gross earnings, which should have been applied to the payment of rent, have been diverted by the lessee to the payment of interest on bonds. This statement, however, is deceptive. From the beginning of operations under the lease in 1867 until April 1, 1878, the Indianapolis & St. Louis Railroad Company paid in full, as it accrued, the whole amount of the rental called for by the lease. During that period, the lessee, being in no default at any time on account of rent, had a legal right to appropriate any surplus of its gross earnings to the payment of interest on bonds, or for the improvement and additional equipment of its road. It was not bound to accumu-

late, out of the surplus of gross earnings, prior to 1878, a fund to meet possible contingencies in respect to rent that might arise after that date. The petitioner, therefore, has no right to complain of any appropriation of the earnings of the leased line during the period in which it received the full amount due to it. If now we turn to a statement of a similar account, beginning in 1878, when the default in the payment of interest began, to the close of the period, May 23, 1882, we are furnished with the following figures: Gross earnings, \$7,443,894.43; operating expenses, including taxes, \$6,253,819.53: leaving net earnings, \$1,190,074.90. During the same period, there was paid on account of rent of the leased line to the petitioner, \$1,450,336.67; making a deficit of \$260,261.77, without reference to any thing paid during that period on account of interest on bonds. That is to say, during the period in which the arrearage on account of rent accrued, there was paid out on account of rent, \$260,261.77 in excess of the entire earnings of the whole line, after deducting the ordinary expenses of operation. During the same period, there was paid on account of interest on bonds the sum of \$490,105, making the entire deficit during that period \$750,366.77. But it is admitted that during the same period the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company and the Pennsylvania Railroad Company made advances in cash to the Indianapolis & St. Louis Railroad Company to the amount of \$510,306.24, a sum greater than the whole amount of the interest paid during the same period on bonds. Even if we should treat the payment on account of interest on bonds during that period of \$490,105 as taken from the earnings, which should have been applied to the payment of the rental, it is to be considered that the payment was made on account of the interest accruing during that period on the first mortgage bonds alone. No interest whatever was paid from Jan. 1, 1878, on account of the interest accruing on the second and third mortgage bonds. It cannot be said that the application of earnings to the payment of the interest on the first mortgage bonds is chargeable to the holders of the second and third mortgage bonds; the latter alone are interested in the fund for distribution. That fund, in the sense of the rule sought to be applied, cannot be said to have been benefited by the payment to other bondholders from the gross earnings applicable to the payment of the rent. The equity of the petitioner, if in fact it exists, is against the holders of the first mortgage bonds, who have actually received the money to which it claims to be equitably entitled. It is further insisted, however, on behalf of the petitioner, that there has been a diversion of earnings to its detriment by payments made for additions and improvements to

the mortgaged property during the years 1878, 1879, 1880, and 1881, amounting to \$256,501.05; but if we exclude from the account the payments made during that period on account of interest on the first mortgage bonds, as should be done, the amount of these betterments of the mortgage security is much more than made up by the cash advances during that period made by the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company, and the Pennsylvania Railroad Company, which, as we have stated, were \$510,306.24.

A special equity is urged as to the unpaid rent of the leased line for the seven months, from April 1 to Nov. 1, 1878, during which nothing whatever was paid on that account, amounting, as found by the decree of July 26, 1882, to \$164,052.82, on the ground that the gross earnings of the leased line during that period were received by the Indianapolis & St. Louis Railroad Company clothed with a trust, and were diverted from their legitimate application to the benefit of the bondholders. As we have already stated, no equity can arise upon the alleged breach of trust unless the second and third mortgage bondholders participated in it, or have been benefited by it. The alleged diversion of this amount is covered by the statements that have been already adverted to. It consists in payments on account of interest on the first mortgage bonds, which must be excluded from the account for reasons already given, and payments made on account of new construction, additions, new equipment, and improvements, more than covered by the cash advances made by the owners of the second and third mortgage bonds. An effort is made in the argument to swell the amount chargeable to permanent improvements by pointing out that from Jan. 1, 1881, to May 23, 1882, more than all of the gross earnings of the entire line were charged up to the operating expense account, without counting any thing for rent of the leased line as an operating expense. The witness who tabulated the schedules in which these statements appear stated, that, during the months covered by these charges for excessive operating expenses, large improvements were being made to the property, but no details were brought out on the examination, and the witness qualified his statement by saying that he did not mean to be understood that the improvements were more than such as were necessary to the proper repair and restoration of the property. We cannot assume by way of conjecture or mere inference that the items referred to were not properly charged as operating expenses. On this branch of the case we conclude that the petitioner has failed to establish any diversion and misappropriation of the earnings applicable to the payment of rent

Unpaid rent
for seven
months. Gross
earnings
diverted from
purpose of
trust.

of the leased line to entitle him in equity to charge the fund in court for the payment of the arrearage in preference to the second and third mortgage bondholders.

Independently of the equity growing out of the alleged diversion and misappropriation of earnings properly applicable to the payment of rent, it is claimed, on behalf of the petitioner, that it has an equitable right to a priority of payment out of the fund in court growing out of the peculiar relations existing between it and the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, and the Indianapolis & St. Louis Railroad Company, as disclosed in the transactions out of which this litigation has grown. It is alleged, in substance, that the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company is the real debtor for this arrearage of rent; that it with the Pennsylvania Railroad Company were in fact the owners of the Indianapolis & St. Louis Railroad, which was built with their money, and for the promotion of their interests, in order, by means of the lease of the petitioner's road, to create a through line from Indianapolis to St. Louis for business between the East and the West, the establishment and operation of which have contributed largely to swell the business upon their own previously existing lines. Having thus induced the petitioner to enter into the arrangement for their benefit, and having secured and actually enjoyed its advantages and profits, the argument now is, that good faith, by an equitable estoppel, forbids the Cleveland, Columbus, Cincinnati, & Indianapolis Railway Company from now asserting a claim which will deprive the petitioner of the compensation agreed to be paid for the use of its road. But this is the very equity which the petitioner sought to enforce by its bill filed Oct. 25, 1878, in which it sought to obtain a decree against its lessee and the guarantors in the lease for the specific performance of the covenant to pay the reserved rent. In that bill reliance was placed, it is true, upon the express covenants which were held finally to be void; but every equitable ground upon the existing facts was invoked in support of the validity of the covenants. The facts supposed to constitute the equity now insisted on were urged then as sufficient to support the obligation based upon the terms of the operating contract and lease. If this equity was not sufficient then to sustain an express promise to pay the rent, it certainly is not strong enough now to justify a decree for its payment standing by itself. To enforce the present claim of the petitioner on this ground would be simply to re-instate as valid the covenants of the lease and guaranty which between the same parties have already been finally decided to be void. It has already been stated that no

Claim to priority growing out of peculiar relations.

default occurred in the payment of the rent by the Indianapolis & St. Louis Railroad Company until April 1, 1878. After that default occurred, no step was taken by the petitioner by any legal proceeding to forfeit the lease and repossess itself of its road. Nothing was done until the filing of its bill, Oct. 25, 1878, to compel the specific performance of the covenants of the lease and operating contract, when the order was made requiring payment to it, pending the proceeding, of thirty per cent of the gross earnings of its road; and an analysis of the tabular statements, already referred to as in evidence, shows that the arrearage of rent, for which payment is now sought, can be recovered only upon the basis of the minimum rental fixed by the lease by the enforcement of the covenants of guaranty declared to be void. The minimum fixed by the lease for the rental of the leased line from June 1, 1867, to May 23, 1882, at \$450,000 per annum, is \$6,750,000; thirty per cent of the gross earnings of the leased road for the same period is \$6,031,465.61, being less than the guaranteed rent by \$718,534.39. In point of fact, the condition of the petitioner, upon the facts as they now stand, without payment of any arrearage of rent, is demonstrably better than it would have been if no lease had been made, and the road had been operated by its own proprietors independently, but as a part of a connected through line. This is shown by the fact that the lessor received as rent during the whole period of the lease, \$6,464,869.19, while the total net earnings of the leased property during the same period are shown to have been only \$5,290,783.02. Presumably these net earnings are as large as they would have been if the road had been operated by its own proprietor. The volume of its business, and the corresponding amount of its gross receipts, were certainly swelled beyond what they would have been if the Indianapolis & St. Louis Railroad had not been built, or had not been operated in connection with it. It follows, therefore, upon the basis of the figures shown in the proofs, that the lessor has actually received, since the lease was made, in excess of the entire net earnings of the leased property, \$1,174,086.17. Indeed, it is further shown, that during the period commencing with 1878, when the default began, the net earnings of the entire line, including the Indianapolis & St. Louis Railroad, as well as the leased road; amounted to \$1,190,074.90, and that during the same period the lessor received on account of rent \$1,450,336.67, being in excess of the net earnings of the two roads.

Upon these facts, we are unable to discover any equitable ground for the relief prayed for by the petitioner. The decree of the Circuit Court is therefore affirmed.

Foreclosure of Railway Mortgages. — Relative Priorities. — See generally as to Claims for Labor and Supplies, note 1, Am. & Eng. R.R. Cas. 516; Mortgagees and Preferred Stockholders, note 9, Ib. 647; Mortgagees and General Creditors during Receivership, note 9, Ib. 718; Mortgagees and Holders of Debenture Stock in Special Case, 1 Ib. 601; Claims for Advances made to Complete Road in Hands of Receiver, Kelly *v.* Receiver, 1 Ib. 617; Debentures under Special Act, Harrison *v.* Cornwall M. R. Co., 3 Ib. 606; Attachment and Mortgage defectively Recorded, Claflin *v.* South Car. R. Co., 4 Ib. 231; Non-surrendered Bonds, Gibbes *v.* Greenville, etc., R. Co., 4 Ib. 459; Mortgage on Personalty and Taxes, Binkert *v.* Wabash R. Co., 5 Ib. 113; Unrecorded Mortgage and Subsequent Judgment Creditor without Notice, Mississippi U. R. Co. *v.* Chicago, etc., R. Co., 8 Ib. 575; Mortgage and General Creditors as to Funds in Hands of Receiver, Addison *v.* Lewis, 9 Ib. 702; Mortgage and Mechanic's Liens, Boston *v.* Chesapeake, etc., R. Co., 12 Ib. 263; Mortgage and Statutory Lien of State, Forrest's Ex'rs. *v.* Luddington, 12 Ib. 330; Unsecured Creditors and Parties taking Lease of Road procured by Bondholders, Farmers' L. & I. Co. *v.* Missouri, etc., R. Co., 19 Ib. 314.

Bank Advancing Money to Embarrassed Railway held not Entitled to Priority over Mortgage Bondholders. — In a suit for foreclosing a railroad mortgage, the court being satisfied that money loaned the railroad company by a bank, an intervening creditor, at a time when the company was much embarrassed, and shortly before the commencement of the suit, went into the general funds of the company, and not especially to the payment of mortgage interest; and that there was no fraud or deception on the part of the trustees, and no misuse of current income by the receiver of the road to the injury of the bank; *Held*, that the bank had only the rights of a general creditor in the distribution of the proceeds from the sale of the mortgaged property. Penn *v.* Calhoun, 121 U. S. 251.

Code Mississippi providing that Mortgage shall not be Valid as against Debts contracted to carry on Business. — Code Miss. § 1033, which provides that no mortgage of the income, future earnings, or the rolling-stock of a railroad corporation, shall be valid against debts contracted in carrying on the business of a corporation, etc., does not give a prior lien to the holders of such claims, but merely prevents those claiming a prior lien under such mortgage from setting it up to defeat such claims.

A railroad corporation, whose property was heavily mortgaged, made arrangements to operate its road in connection with other roads. The management of these roads was under the same general officers, although the business of each was kept separate. Sums were loaned by the corporations controlling the connecting lines to enable the indebted railroad corporation to pay its taxes, to pay its employees, and to pay balances due themselves. *Held*, that these loans were debts contracted in carrying on the business of the corporation, within the provisions of the Code.

Where current debts are incurred by a railroad company in the operation of its current business, they are chargeable upon the current income, as against holders of mortgage bonds of such railroad, whether they accrued before or after the railroad went into the hands of a receiver; and the fact that such debts were incurred for betterments does not affect the right to have them paid out of the current income, when the proofs show such betterments to have been necessary. Farmers' Loan and Trust Co. *v.* Vicksburg, etc., R. Co., 33 Fed. Rep. 778.

Sale of Property Subject to Prior Lien. — The receiver in a suit for the foreclosure of a railroad mortgage, being directed by the court to settle and adjust outstanding claims prior to the mortgage debt, and to purchase in outstanding adverse liens or titles, agreed with the holder of a debt, which constituted a paramount lien on a portion of the railroad, for the purchase of his

lien, and the payment of his debt out of any money coming into the receiver's hands from the part of the railroad covered by the lien, or from the sale of the receiver's certificates, or from the earnings of that portion of the road, or from the sale of it under the decree of the court; and this agreement was carried out on the part of the vendor. When it was made, a decree for a sale had already been made in the foreclosure suit; and afterwards the road was sold as an entirety, with nothing to show the price paid for the portion covered by the lien, and payment was made in mortgage bonds without any money passing. The vendor of the prior lien then intervened in the suit, asking the court to enforce his agreement with the receiver. Subsequently the court confirmed the sale, reserving to itself the power to make further orders respecting claims, rights, or interests in, or liens on the property. At a subsequent term of court, the court found that there was justly due the intervenor the sum claimed, and ordered the sale set aside, unless the claim should be paid within ninety days. *Held*, that the intervenor was entitled to the protection of the court, but that the proper remedy was not the annulling of the sale, and confirmation, and master's deed, if the court had the power to do it, but an order for a re-sale of the entire property in satisfaction of the claim of the intervenor. *Farmers' Loan and Trust Company v. Newman*, 127 U. S. 649.

Rights of Bondholders purchasing Bonds under Fraudulent Prospectus. — In *Banque Franco-Egyptienne*, 34 Fed. Rep. 162, it appeared that the complainants, acting as a syndicate, purchased part of an issue of railway mortgage bonds offered for sale to the public by a prospectus issued by the agents of the railway company. Trustees had been appointed by an agreement between the several constituent companies composing the railway company to receive and disburse the proceeds of the bonds for certain specified objects, among them the payment of the debts of the constituent companies. In a suit brought by complainants against the railway company, the trustees, and various defendants to whom the trustees had paid part of the proceeds of the bonds, the bill alleged that the prospectus contained various untrue and fraudulent representations; that the complainants relying thereon had been induced to purchase the bonds by fraud; that the trustees and the other defendants who had received part of the proceeds were aware when they received the money of the false and fraudulent character of the prospectus; and that the prospectus also contained a promise that the proceeds of the bonds should be used to complete the construction of the railway, and not for the extinction of liabilities of the constituent companies; but the proceeds were applied in part by the trustees, and were received by the other defendants in payment of such liabilities, with knowledge of this promise. The object of the suit was (1) to rescind the purchase for fraud, and charge the trustees and the recipients of the moneys from them as trustees *ex maleficio*; and (2) to enforce the promise of the prospectus as a promise to the purchasers of bonds in the nature of a trust, and compel the trustees and the recipients from them to account for the part appropriated contrary to the promise. *Held*, that complainants were merely creditors of the company, and as such, even were the issue presented by the bill, could not assail the validity of the agreement appointing the trustees, nor question the doings of the trustees as such.

The court also determined the following points: —

Misrepresentation by prospectus, except as between promoters and shareholders, is to be tried by the ordinary criterion of misrepresentation. But a reasonable construction of the language of a prospectus may require that a future tense should be given to words in the past or present tense.

A right of rescission because of misrepresentations in a prospectus must rest upon misrepresentations concerning material facts, and not of mere matters of opinion, and must relate to existing facts, and not to matters of

future conduct or expectation. It cannot be founded upon the breach of pure promissory statements.

Unless promissory statements are such as imply that a certain condition of things, or state of facts, exists at the time to form the basis of the promised future state of things, they do not give birth to a right of rescission. Fraud cannot be predicated of promises not performed for the purpose of avoiding a contract.

If a prospectus contains material false representations, those who authorize it to be issued cannot repudiate them as made without their authority, while retaining the fruits of the prospectus.

A statement in a prospectus respecting the uses to which the moneys to be derived from the sale of bonds are to be applied is to be construed as a representation of intention, or the expression of the expectation and purpose of the promoters, if the language falls short of a distinct and unequivocal promise.

When a prospectus contains a statement which may be construed as a promise by the promoters to the purchasers of bonds that the moneys derived from the sale of the bonds will be used for certain specified objects, and not otherwise, and the promoters upon receiving the moneys pay them out to creditors of the company, disregarding the promise in the prospectus, the bondholders, although they relied upon the promise in parting with their money, cannot reclaim it upon the theory of a trust, and follow it into the hands of those who received it lawfully from the promoters, although with notice of the promise. It is only when money is held in a fiduciary character, so that the equitable title is in the beneficial owner, that the latter can follow it into the hands of a third person.

Power of a Railroad Company to Guarantee the Bonds of another Company sold by it. — A railroad corporation, which has power by its charter to issue its own bonds, has power to guarantee the bonds of another railroad corporation, which it receives in payment of a debt due to it, and which it sells for value, or transfers in payment of its own debts, the guaranty being given as the means of augmenting the credit of the bonds, or to enable it to obtain an adequate price for them. *Rogers L. & M. Works v. Southern Railroad Association*, 34 Fed. Rep. 278.

See *Camden & A. R. Co. v. Coxe*, and note, 26 Am. & Eng. R. R. Cas. 102, 105.

UNION TRUST COMPANY

v.

MORRISON.

(125 *United States Reports*, 591.)

Mortgage. — Foreclosure. — Rights of Surety. — The entire rolling-stock of a railway company in Illinois was covered, as well as all its other property, by a mortgage to trustees to secure an issue of outstanding bonds. A judgment creditor of the company being about to levy upon some of the rolling-stock, the company filed a bill in equity to restrain the levy and to set aside the judgment as obtained by fraud, and an injunction issued restraining the creditor from making the levy, a bond with surety being first filed conditioned to pay the judgment debt, if the injunction should be dissolved. The surety in that bond took as security a chattel mortgage of four locomotives.

33 A. & E. R. Cas. — 3.

Proceedings were then taken for the foreclosure of the mortgage, and a receiver of all the property covered by the mortgage was appointed. Several suits against the company were then pending, in which appeal had been taken and appeal bonds given, in order to protect the rolling-stock. The receiver then suggested, making special mention of the above recited case, that the sureties should be protected in the advent of adverse decisions, and the court authorized him in his discretion to protect such sureties as ought to be protected, by reason of the protection afforded to the property and assets of the company by the giving of their bonds; and an order was made that all persons having claims or liens against the property or its proceeds should file intervening petitions on or before a day named. The surety in the injunction bond intervened within the time fixed, setting forth the facts, and that judgment had been entered against him, and asking to be protected from the consequences of signing the bond, as the receiver had not been able to pay the debt of the judgment creditor. The property covered by the mortgage was then sold, and purchased by persons representing the bondholders, and it was referred to a master to report upon the intervening claims. The trustee and the receiver objected to the allowance of the claims of the surety on the injunction bond, on the ground that the execution in the original suit could not become a lien upon the property as against the mortgage bondholders, and on the further ground that the surety had not paid the judgment debt. The surety then paid the judgment debt, and filed a supplemental petition, setting that fact forth, and repeating this original application; but the master rejected the claim on the ground that the payment was not made when he filed his original claim, nor until the time had expired for claims to be presented. *Held, —*

1. That the claim was presented in time; and that, although the surety had not paid the judgment when the claim was presented, he was entitled in equity to be protected from making the payment;

2. That the purchasers at the foreclosure sale, having been represented in the foreclosure proceedings by the trustees of the mortgage, were bound by whatever bound the trustees, including the orders of the court respecting the paramount lines of the intervening claimants;

3. That as, until the mortgage was enforced by entry or judicial claim, the personal property of the company was subject to its disposal in the ordinary course of its business, and to be seized and taken on execution for its debts, subject, however, to the contentions of the mortgage trustees, the act of the surety on the injunction bond had operated to keep the property together, and to keep up the railroad as a going concern;

4. That the taking of the chattel mortgage by him showed that he intended to look to the property, and not alone to the personal security of the company;

5. That the evidence referred to in the opinion showed that the receiver received moneys from which he might have paid the judgment debt;

6. That the purchasers of the property accepted a deed, executed under order of court, in which they recognized the right of the surety as an intervenor.

The court does not intend, in this case, to decide any thing in conflict with *Burnham v. Bowen*, 111 U. S. 776, and only decides that this claim, being based upon a *bona fide* effort by the intervenor, to preserve the fund from spoliation after the mortgage debt was in arrear and the right to reduce to possession had accrued, the claimant can pursue earnings which had been appropriated to the purchase of property that had been added to the fund.

The action of the intervenor not being taken for the purpose of being subrogated to the questionable rights of a judgment creditor, the court expresses no opinion upon the rights of an execution creditor, levying on the personal property of a railroad company in Illinois, as against those of a mortgagee.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

S. Corning Judd, William Ritchie, and Edward B. Esher for appellants.

C. W. Thomas and *Gustav Koerner* for appellee.

BRADLEY, J. — This case grows out of the foreclosure of a mortgage given by the Cairo & St. Louis Railroad Company on the second day of October, 1871, to the Union Trust Company of New York, to secure the payment of 2,500 bonds of \$1,000 each, with interest semi-annually. Morrison, the ap-
Facts.
 pellee, intervened in the proceedings, by petition, claiming a lien on the property mortgaged, by reason of having become liable as surety on an injunction bond given to obtain an injunction to prevent an execution sale of a portion thereof. The court below, by a decree dated May 4, 1884, allowed his claim, amounting to the sum of \$15,352.19, with interest from May 20, 1882. The purchasers at the foreclosure sale (who purchased on behalf of the bondholders) having transferred the property to the St. Louis & Cairo Railroad Company (organized for that purpose), said company was allowed to become a party to the proceedings for the purpose of appealing from the decree, and did appeal from the same in connection with the Union Trust Company. The case is now before us on that appeal. The facts necessary to be understood in the determination of the case are as follows: The Cairo & St. Louis Railroad Company was a corporation of Illinois, owning and operating a railroad in that State, extending from Cairo to a point opposite St. Louis. The mortgage referred to purported to convey and embrace all the property and assets of the company, real, personal, and mixed, then held and owned, or thereafter to be acquired, and the tolls, incomes, rents, issues, and profits thereof; and it contained provisions authorizing the mortgage trustee (the Union Trust Company) to take possession of said property and assets in case of default, for a certain period of time, in the payment of interest, or of the instalments of a sinking fund provided for; and gave said trustee power, on such default, to declare the principal due. The railroad company made default in the payment of interest in October, 1873, and at every subsequent period of payment, and never paid any instalments of the sinking fund. Meantime, the company was harassed by suits, and, among others, one Henry Holbrook, on the 26th of November, 1872, recovered a judgment against it in the Circuit Court of St. Clair County, Ill., for the sum of \$9,500, besides costs. Execution was issued, but not levied. But in October, 1874, an *alias* execution was issued, and the sheriff of St. Clair County threatened to levy upon the rolling-stock of the company, a great part of which was in that county, opposite St. Louis.

The company, believing the judgment to have been fraudulently and wrongfully obtained, filed a bill in equity in the St. Clair Circuit Court to enjoin Holbrook from proceeding to its collection. An injunction was granted accordingly on the 30th of December, 1874; but only upon the condition that the company should give an injunction bond, with sureties, for the payment of judgment and costs, if the injunction should be dissolved. Morrison, at the request of the company, executed such bond as surety. In February, 1877, the bill for injunction was dismissed, and in June, 1879, the decree of dismissal was affirmed by the Supreme Court of Illinois, and the injunction was definitively dissolved. Thereupon Holbrook sued Morrison on the injunction bond, and on the 30th of September, 1880, recovered judgment against him for the sum of \$13,965. Prior to this time, in November, 1877, the trust company declared the principal of the bonds due, and filed a bill in the court below to have a receiver appointed and the mortgage foreclosed. Henry W. Smithers was appointed receiver, with power to operate the road, and equip it, and keep it in repair, and to pay all amounts due and owing by the railroad company for labor or supplies that might have accrued in the operation and maintenance of the railroad property within six months immediately preceding. The receiver, on taking possession of the property, found a number of suits against the company pending on appeal, and claims for protection on the part of those who had become sureties on the appeal bonds; and on the 29th of December, 1877, he presented a petition to the court, asking its advice and instruction in regard to said bonds, and whether he should protect the sureties in the event of adverse decisions in any of the cases. He stated the fact that such appeal bonds were given by some of the officers of said railroad company, with others as sureties, in order to protect the rolling-stock or other personal property of said railroad company from levy or sale under execution pending the determination of the appeals; in each of which cases execution on the judgment or decree was either levied on personal property of said railroad company, or the levy thereof threatened at the time of taking the appeal and giving the bond. He mentioned the Holbrook case in particular, which was then pending before the Supreme Court of Illinois on appeal, and called attention to the injunction bond given in that case; and he expressed his concurrence in the statement of the sureties generally, that they had become such on the assurance of being protected, and that their action had been to the benefit of all parties interested in the property of the company, since, in default of payment, it would have been sacrificed to meet the demands. The court, on consideration, made a decree authorizing the receiver, in his discretion, to prosecute or defend the

appeals and cases, according as the interests of the receivership should in his judgment be best promoted; and to protect such sureties as in his judgment ought to be protected in equity and good conscience by reason of the protection afforded to the property and assets of the company by means of the giving of such bonds. And, for the purposes of this decree, the receiver was authorized to use and pay out any moneys coming into his hands as such receiver, over and above expenses for operation and repairs. The receiver, for alleged lack of funds coming into his hands, failed to protect any sureties except two, one Rosborough and one Pellet. On the 16th of May, 1881, a decree was made in the foreclosure suit, ascertaining the amount due on the bonds and coupons to be \$4,301,157.53, and directing a sale of the mortgaged premises to satisfy the same. The decree required all persons having claims or liens against the railroad and property, or against the proceeds of the sale thereof, to file intervening petitions on or before the first day of July, 1881. In accordance with this order, Morrison, on the thirtieth day of June, 1881, filed his intervening petition, setting up the facts respecting his becoming surety on the injunction bond, the preservation of the rolling-stock by means thereof, the proceedings in the case, and the proceedings against himself on the bond, resulting in the judgment rendered against him on Sept. 30, 1880. He also set out the copy of a mortgage on four locomotive engines, given to him by the railroad company in June, 1875, by way of indemnity against his liability on the injunction bond; which mortgage was duly recorded in the clerk's office for St. Clair County, but was never enforced by him; he stating the fact to be, that the said company and the receiver had used the said locomotive engines continuously since the execution of the said mortgage, and the same were then in the possession of the receiver, and were to be sold at the sale of the property under the said decree of foreclosure. He further set out a copy of the petition presented to the court by the receiver, asking for instructions as before stated, and bringing to the notice of the court the Holbrook judgment and appeal, and the injunction bond given in that case. He further stated, that the receiver, since his appointment, had not been able, out of the earnings of the railroad, to pay the judgment of Holbrook, and thus protect the sureties on the injunction bond. His petition closed with a prayer for a decree that he should be fully protected from all the consequences of signing the said bond, and from the judgment recovered against him and for further relief. On the 5th of July, 1881, an order was made declaring that no claim presented or filed after the 1st of July, 1881, should be received or filed; and that all claims not so filed on or before that date should be forever barred from any

benefit under the decree, or from the property, or the proceeds of its sale. On the 14th of July, 1881, the railroad and other property covered by the mortgage were duly sold in accordance with the decree of May 16, and Josiah A. Horsey and Charles J. Canda, on behalf of the bondholders, became the purchasers for the sum of \$4,000,000, which sale was, on the same day, ratified by the court; and an order was made referring to a special master, Frank H. Jones, all the intervening claims and petitions filed in the cause, to take proof and report his conclusions of fact and law thereon, for the consideration of the court, and to give notice to the parties of the time and place of taking testimony. On the 1st of August, 1881, an order was made referring it to a master to examine and report the amount of receiver's certificates remaining unpaid, and of all claims against the receivership, or railroad assets in the receiver's possession, as shown by intervening petitions or claims filed in the cause before July 1, for labor, supplies, or other claims; and whether there was sufficient showing in the several cases to warrant funds to be paid into court to cover the same; also the probable amount of costs and fees. The object of this order was to ascertain how much money the purchasers should be required to pay into court, and how much of their bid might be paid in bonds. On the 19th of August, 1881, the Union Trust Company and the receiver filed a joint answer to Morrison's petition of intervention, in which all its material statements were admitted; but while admitting that the sheriff of St. Clair County did threaten to levy on the railroad company's locomotives and rolling-stock, they denied that, as against the bondholders and the Union Trust Company mortgage, the execution was a lien on said locomotives and stock paramount to that of the mortgage. They also denied that the chattel mortgage alleged to have been given by the railroad company upon certain locomotives, for the purpose of securing the sureties on the injunction bond, could have any effect, or create any lien on said property paramount to that of the Union Trust Company mortgage. The respondents admitted that the railroad company and the receiver had continually used the engines and property owned by the company in 1875; but whether they were the same which were included in the alleged chattel mortgage they could not say. They admitted that the receiver had not paid, and had not been able out of the earnings of the road to pay, the judgment of Holbrook, and submitted to the court that if he had been able, he would not have had any right or authority to pay the same. They further alleged, upon information and belief, that the judgment remained wholly unpaid; that neither Morrison nor the railroad company had paid it, and they submitted to the court

that there was no liability on the part of the receivership, or of the property, for the payment of the judgment. On the 22d of December, 1881, an order was made by the court, by which, after reciting that Horsey and Canda had paid to the commissioner the full amount of their bid for the railroad property and assets, namely, in cash, \$100,000, and the residue in first mortgage bonds of the railroad company, it was ordered and decreed that the commissioner should execute a deed of conveyance of the said property and assets, to the said Horsey and Canda, to be held subject to all taxes legally due, to the lien of all unpaid receiver's certificates; "and also subject to the lien of any and all claims against the said railroad property and assets which are now before this court by intervening petitions, and which shall be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by said mortgage or deed of trust." On the 19th of January, 1882, the receiver was also directed to make a conveyance to the purchasers, in order to cover certain real estate, rolling-stock, and other property which had been acquired by him during his receivership; and to deliver the possession of all such real estate and other property to the purchasers or their grantees, when the commissioner's deed should be presented to him and demand should be made. The receiver made such conveyance on the 30th of January, 1882, and on the 31st, Horsey and Canda conveyed all the property to the St. Louis and Cairo Railroad Company, the appellants; and on the following day, Feb. 1, 1882, the receiver delivered the railroad and all its appurtenances to said company. As the Union Trust Company and the receiver, in their answer to Morrison's intervening petition, raised the objection that he had not paid the Holbrook judgment (though, of course, he was bound to pay it), he filed a supplemental petition on the 5th of June, 1882, stating that he had paid the judgment on the 29th of May previous, amounting on that day, for principal and interest, to the sum of \$15,352.19, and repeated his original application for relief. To this supplemental petition, the Union Trust Company and the receiver filed an answer by which they denied that Morrison had paid the judgment; recited the previous orders requiring claims to be filed by the 1st of July, 1881, and barring those not so filed, — the sale of the property, the conveyance thereof to Horsey and Canda, and by them and the receiver to the new company, and the delivery of the railroad property to said company; and averred that there were no proceeds of the sale in the hands of the receiver, out of which payment could be made to Morrison upon his claim. On the 19th of December, 1883, the special master, Frank H. Jones, to whom, at the time of the sale of the railroad, had been referred inter-

vening claims and petitions filed in the cause, made a report, in which he set forth in detail all the facts and circumstances in relation to the intervening petition and claim of Morrison, as they have been already stated, and the evidence taken by him thereon. The only point contested by the respondents, was the fact of payment by Morrison, and its effect under the previous orders of the court. The evidence reported by the master, however, showed that Morrison did actually pay the judgment at the time stated in his supplemental petition, and the master so found. The exception taken on this point by the respondents, based on the fact that Morrison, in order to make the payment, raised the money on his note, and that it did not appear that he had paid his note, is too trivial for serious consideration. The conclusion reached by the master was, that the claim was barred because Morrison had not actually paid Holbrook's judgment when he filed his original petition, and did not pay it until after the time had expired for claims to be presented, namely, July 1, 1881. Morrison excepted to the report, and on the 5th of May, 1884, the court sustained the exception, and allowed the claim, and decreed that Morrison had an equitable lien for the payment thereof, against the property sold under the decree of foreclosure, and transferred to the St. Louis and Cairo Railroad Company, with leave to apply to the court for further relief, if the claim should not be paid before the first Monday of September then next. This is the decree from which the appeal is taken to this court.

The plea that the claim was not presented in time, we think is wholly untenable. It was brought to the notice of the court by the receiver himself, a few days after his appointment. The case, however, was still pending in the State court on appeal, and it was yet uncertain what would be the result. The injunction was not definitely dissolved until June, 1879. The liability of Morrison on his bond was still unadjudicated, and not in a condition to be presented by him as a fixed and determinate claim against the railroad company and its property. Suit was then brought against him, and judgment rendered on the 30th of September, 1880. The foreclosure proceedings were still pending. In May, 1881, the final decree of foreclosure of the railroad property was made, and the time for presenting claims was fixed, to expire on the first day of July, 1881. Morrison presented his claim by filing his intervening petition within that time. He stated his entire case. He had not paid the judgment against him, it is true; but, in equity, (if he had any equity at all), he ought to have been protected from making that payment. It ought to have been made by the receiver out of the property which came into his hands. The

The claim was presented in time, and when presented was ripe for the protection asked.

reason he (the receiver) did not pay it seems to have been want of pecuniary funds. As will be seen, he had disposed of these funds in other ways. But surely, if Morrison had an equitable right to be protected, he ought not to be shut out from all remedy, because he did not do what ought to have been done by the receiver himself, or by the parties whom the receiver represented. We think that the court below was perfectly justified in sustaining the exception to the master's report, so far as it was based on the idea that Morrison's claim was barred by reason of his not actually paying the Holbrook judgment until after the period of limitation fixed by the court for the presentation of claims. The claim was presented in time, and, when presented, was ripe for the protection asked for by the petitioner. If he was afterwards compelled to make the payment himself, which those who received the railroad property ought to have made, it only converted his claim for protection into a claim for indemnity, and made his equity all the stronger. The plea of want of notice on the part of the purchasers of the railroad is equally groundless. The purchasers were really the bondholders themselves. They were represented in the foreclosure suit by the Union Trust Company. They purchased expressly subject to the lien of any and all claims against the railroad property and assets which were then before the court by intervening petition, and which should be, upon final determination and adjudication, decreed to be paid as paramount liens. Morrison's claim was in this category. It was then before the court by his intervening petition. The purchasers were bound to take notice of it. They had notice of it. The pretence of want of notice is entirely without foundation.

Plea of want of notice groundless.

The only serious ground of defence to the petition is the legal question, whether a claim arising under the circumstances, and at the time in which this did, has an equity to be paid out of the property of the railroad company sold under the mortgage, and conveyed to the present company. The ground of the claim is, that a portion of the property covered by the mortgage, being in peril of abstraction and loss, was rescued and saved to the mortgage by the act of the petitioner. It is denied that the property was in any peril, because, as contended by the respondents, it could not have been taken in execution by reason of the prior lien of the mortgage. But it must be conceded, that, until the mortgage was enforced by entry or judicial claim, the personal property of the railroad company was subject to its disposal in the ordinary course of business, and, as such, was liable to be seized and taken on

The only serious ground of defence.

Peril of the property rescued by acts of petitioner.

execution for its debts. This is not only common law, but the positive law of Illinois. By the Constitution of 1870 (art. 11, § 10) it is declared that "the rolling-stock, and other movable property belonging to any railroad company or corporation in this State, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals." Even if it would have been subject to the mortgage when taken on execution, nevertheless it could have been taken; and this would necessarily have disturbed, and perhaps interrupted, the operations of the railroad, by separating the property seized from the *corpus* of the estate. The trustees of the mortgage might have prevented such a catastrophe, it is true, by filing a bill of foreclosure, and for an injunction and receiver; but they did not choose to take this course until nearly three years afterwards. On the contrary, they allowed the railroad to continue to use the property, and to take care of it for them, and stood by and saw Morrison, who had no interest in the matter, put his hands into the fire and rescue the rolling-stock of which they were to receive the benefit, — both directly, by receiving the property itself without contest or controversy, and indirectly, by keeping up the railroad as a going concern. Morrison's money, or the fruits of it, has gone into their pockets. And, in this regard, we make no distinction between the mortgagees, the bondholders whom they represented, the nominal purchasers Horsey and Canda, or the present company. They were all one and the same in interest. If the property became justly affected by the equity of the petitioner's claim, it remains so affected in the hands of the present company. A circumstance to which some weight is due is the chattel mortgage given by the railroad company to Morrison on the four locomotives

Chattel mortgage given to Morrison on locomotives.

therein described, to secure him and his co-sureties against the payment of Holbrook's judgment. It shows that they intended to look to the property, and not alone to the personal security of the company. He did not attempt to enforce this mortgage, it is true, and did not have it renewed, but followed out the original idea of preserving the stock entire, and keeping up the property as a going concern. Instead of giving this mortgage, the company might, with perfect propriety, have placed funds in the hands of the sureties to enable them to protect themselves, and the transaction would not have been questioned. By not doing so the receipts and revenues which would have been required for this purpose went, in the end, to the benefit of the bondholders. It enabled the company to continue its operations for the time being, and resulted in supplying the receiver with means of purchasing outside property, which, by order of the court, he

conveyed to the purchasers of the road, or their assignees. The main pretence for not protecting Morrison and his co-sureties was, that the receiver never had receipts in his hands with which he could have protected them; and this assertion seems to have been credited by the intervenor. But this pretence cannot be true. It is refuted by the record itself. The order of Jan. 19, 1882, recites that the deed from the special commissioner who sold the railroad under the decree of foreclosure, did not fully cover and convey the legal title to certain real estate acquired by and conveyed to Smithers as receiver, purchased by him under authority of the court, and he was, therefore, ordered to convey all such property, as well as all personal property and rolling stock purchased by him while receiver, to the purchasers of the railroad, or their assigns. This shows that he had receipts with which he purchased new property, real estate and rolling-stock, which went to increase the *corpus* of the fund of which the bondholders received the benefit. The intervenor's equity is a very strong one. His case clearly came within the scope and intent of the decree made Feb. 4, 1878, which authorized the receiver to protect those sureties on appeal and injunction bonds, who ought to be protected in equity and good conscience by reason of the protection afforded the property and assets of the railroad company through or by means of the giving of such bonds. The complainants (the mortgagees) raised no objection to that decree. Until after the sale of the railroad, and until the trust came to be wound up, the only plea was that the receiver had not realized sufficient funds from the current receipts of the road to enable him to protect the intervenor. This plea, if a good one, as we have seen, is not sustained by the facts. He actually expended moneys in the purchase of new property, real estate, and rolling-stock, and paid over to the purchasers every thing that came into his hands, before and after the sale, not used for expenses. It is not shown what these purchases and payments amounted to, but they were probably considerable; and the complainants and receiver could easily have shown that they were insufficient for the indemnification of the intervenor, if such had been the fact. The proof was in their hands, and not in his. It is further to be borne in mind that the purchasers of the railroad accepted a deed therefor from the commissioner, under an order of the court, expressly declaring that they should hold the property subject to all taxes legally due, to the lien of all unpaid receiver's certificates, and also subject to the lien of any and all claims against the railroad property then before the court by intervening petitions, which should

Reason for
receivers not
protecting
Morrison.
Lack of funds.

Intervenor's
equity is
strong. His
case comes
within intent
of decree of
1878.

be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by the mortgage. The intervenor's claim is precisely in that category. The case is a special one, and, in view of the discretion which the court of first instance is obliged to exercise in matters of this character, taking all the circumstances into consideration, we cannot say that equitable relief was unduly extended in allowing the intervenor's claim. An examination of the cases bearing upon the subject does not lead to a contrary conclusion. See *Fosdick v. Schall*, 99 U. S. 235; *Miltenberger v. Railway Co.*, 106 U. S. 286; s. c., 12 Am. & Eng. R.R. Cas. 464; *Trust Co. v. Souther*, 107 U. S. 591; s. c., 11 Am. & Eng. R.R. Cas. 707; *Burnham v. Bowen*, 111 U. S. 776; s. c., 17 Am. & Eng. R.R. Cas. 308; *Trust Co. v. Railway Co.*, 117 U. S. 434; *Dow v. Railroad Co.*, 124 U. S. 652; *Sage v. Railroad Co.*, 125 U. S. 361. The appellants place much reliance on the case of *Burnham v. Bowen*, where it was held that debts for operating expenses are privileged debts, entitled to be paid out of current income, and that, if such income is diverted by the mortgage trustees or the receiver for the improvement of the property, such debts will be decreed to be paid out of the mortgage fund. But it was added by way of caution, "We do not now hold, any more than we did in *Fosdick v. Schall*, or *Huidekoper v. Locomotive Works*, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." It is this remark on which the appellants rely. It is not our intention, however, to decide any thing in the present case in conflict with it. The claim in that case was for operating expenses only, and the rule laid down had special reference to them. The present claim is of a different character, based upon a *bona fide* effort made by the intervenor to preserve the fund itself from waste and spoliation after the mortgage was in arrears, and the right to reduce it to possession had accrued. But even here, as we have seen, if the claimant could pursue only the earnings, it is shown that they have been appropriated to the purchase of property which has been added to the fund. Much of the argument of the appellants is based on the hypothesis that the claim of the intervenor was a claim to be subrogated to the lien of the *Holbrook* judgment; and it is argued that this lien was subordinate to that

Priority of
debts for
operating
expenses.

of the mortgage held by the complainants. We do not understand that the claim was presented in any such view. The Holbrook judgment and execution could have greatly deranged the business of the company as a going concern. The rolling-stock could have been seized and removed. Whether such seizure could or could not have been prevented by the mortgagees, is a different question. It would, at all events, have required legal proceedings, and probably serious litigation; and this the mortgagees did not see fit to undertake. To save the property from being taken, to prevent the catastrophe which its taking would have caused, and the serious questions which would have arisen had it actually been sold, the intervenor gave his bond to obtain an injunction. It was not done for the purpose of being subrogated to the questionable rights of Holbrook under his judgment, but to prevent the certain injury to the property itself, which the attempted enforcements of those rights would have involved. It is unnecessary, therefore, to discuss the rights of an execution creditor levying on the personal property of a railroad company in Illinois, as against those of a mortgagee. We express no opinion upon that subject. The claim was presented upon the equities arising in favor of the intervenor for taking the action he did, and thus securing the results which followed, and upon the other circumstances of the entire case taken together; and it was upon these grounds that the claim was allowed by the court below. The decree of the Circuit Court is affirmed.

Effect of Tripartite Contract between Railway Company, Mortgage Trustee, and Party advancing Money on Payment of Interest and Foreclosure. — One L. was a trustee of the first mortgage bonds of a street-railway company. The company needing a further loan, it was agreed by a so-called "tripartite contract" between one P., L., and the company, that P. should take charge of the railway, and advance a sum not to exceed \$50,000 for its assistance, and, as a security for this sum, should have a first lien upon all of the company's property; "a final settlement to be made between the parties at the end of three years from the date of the contract." The company having failed to meet the interest on the bonds, L. foreclosed the mortgage for the benefit of the bondholders and P. In a suit by the company to set aside the mortgage, solely on the ground that under the "tripartite contract" the interest on the bonds was not due until the expiration of the three years, *held*, that the contract did not apply to the payment of interest on the bonds, and that such claim was without foundation.

In the so-called "tripartite contract" the railway company contracted with P. that he should advance a sum of money, and L., the trustee under the company's mortgage, agreed with P. that the latter's claim should have preference over the mortgage, but there were no undertakings in the agreement as between the company and L. *Held*, that the company could not, under the contract, claim that the right of L. to foreclose the mortgage was affected thereby. *South St. Louis R. Co. v. Plate*, 92 Mo. 614.

Intervention after Decree of Foreclosure. — A trust company, citizen of New York, filed a bill in the Federal court against a railway company, citizen of Texas, to foreclose a mortgage, and for a sale of the premises, and also

asked that certain persons, citizens of Texas, who had obtained judgments, and were seeking to enforce them, against the railway company in the State court, be made parties, and required to assert their claims, in the action in the Federal court. Pending the hearing of the bill, a sale of the road was had, pursuant to a decree of foreclosure rendered in the State court in favor of a citizen of Texas, who was made a party to the bill. It was purchased by a citizen of New York, who afterwards assented to an appointment of a receiver in the Federal court. *Held*, after judgment on the bill *pro confesso* against the defendants, citizens of Texas, that citizens of New York, who claimed an interest in the road acquired after the jurisdiction of the Federal court had attached, as being the real parties in interest for whom the sale and purchase in the State court was had, were entitled to intervene and set up their rights. *Farmers' Loan & Trust Co. v. Texas Western R. Co.*, 32 Fed. Rep. 359.

TEXAS WESTERN R. CO.

v.

GENTRY.

(*Texas Supreme Court, Feb. 7, 1888.*)

Purchase of Railway. — Action for Purchase-Money. — Equitable Mortgage. — Property subsequently acquired. — One G. sold a certain line of railroad property to H. H. assigned his interest to a construction company; and G., at the special request of such construction company, transferred the property to defendant. Defendant accepted the conveyance, in consideration therefor, by a resolution of its board of directors entered on its minutes, and agreed to pay a certain amount of money, and deliver certain stock and bonds. The cash was paid, and the stock delivered, and a resolution passed stipulating to immediately deliver the bonds, which, however, were never delivered. G.'s administratrix subsequently claimed an equitable mortgage upon the property of the defendant for the amount of the bonds and interest, and also a vendor's lien upon the same, and filed a petition claiming judgment and foreclosure. *Held*, —

1. That defendant, by accepting the conveyance, and agreeing to provide the consideration, took upon itself the fulfilment of the original contract, and is estopped to deny the consent of the construction company to its substitution;

2. That the minutes of the defendant accepting the conveyance constitute a contract in writing, and that an action could be brought thereon in four years, Rev. St. Tex. art. 3205, enacting that an action for debt, where indebtedness is evidenced or founded on any contract in writing, shall be commenced and prosecuted within four years from accrual of the cause of action;

3. That, although a statute (Rev. St. Tex. art. 4240) enacted that no mortgage of a railroad company shall be valid unless authorized by resolution adopted by a vote of two-thirds of all the stock of such company, yet as a contract had been executed, and the company had had the benefit thereof, it is estopped from denying its authority to make the contract;

4. That the plaintiff is entitled to recover the full par value of the bonds, though they might be below par in market;

5. That, the petition alleging the insolvency of the defendant and asking that a receiver be appointed, it is proper to grant the relief asked, and to

order a sale of the property, the proceeds being held in court until the equitable owners of the bonds could set up their title thereto, although such equitable owners were not made parties to the suit;

6. That although the railway had been sold to the defendant as unincumbered, the fact that there was a right of way still unacquired, the evidence showing that the directors of the defendant company knew that all the rights of way had not been paid for, and that there were small claims that G. had been unable to settle, and that the line had been operated for ten years, and no action for the land over which it ran or for damages had ever been brought, will not preclude the plaintiff from obtaining a judgment for the full amount claimed.

In an action against a railroad company to foreclose an equitable mortgage, it appeared that the plaintiff's intestate conveyed a certain line of railway property to defendant, the purchase-money to be secured by mortgage upon the line conveyed, and "upon such proposed extensions as the company owning and operating the same may elect to include in such mortgage." At a stockholders' meeting it was voted to issue bonds of the same character as those sued on, to be secured on all the property, etc., of the company from H. to P., both constructed and to be constructed, which included the only extension made by the company. *Held*, that plaintiff's equitable mortgage extended to the part of the line subsequently constructed.

ERROR from District Court, Harris County; James Master-son, Judge.

Mary F. Gentry, as administratrix of A. M. Gentry, deceased, brought an action against the Texas Western Railway Company for foreclosure of a vendor's lien, an equitable mortgage, and for a money judgment. Verdict for plaintiff. Defendant brings error.

Stuart & Breaker, and *Ballinger, Mott, & Terry*, for plaintiff in error.

Hutcheson, Carrington, & Sears for defendant in error.

GAINES, J. — The defendant in error, Mary F. Gentry, as administratrix of the estate of A. M. Gentry, deceased, brought this suit against the plaintiff in error, a railroad corporation organized under the general laws of this State, alleging, in substance, that her intestate in his lifetime entered into a contract with one Honoré, by which he agreed to transfer to the latter the property and franchises of the Texas Western Narrow-Gauge Railway Company, free from all incumbrances; that Honoré, in consideration of the transfer, was to pay her intestate certain sums in cash, and to deliver to him certain shares in a new company to be organized to operate the railroad, and that, in addition thereto, he was to receive bonds of the new corporation to the amount of \$200,000, secured by a mortgage upon its property, running twenty years, and bearing six per cent interest, payable semi-annually. It was also alleged that Honoré assigned his interest in this contract to the Texas Western Construction Company, and that, at its request, Gentry executed the

Facts.

contract on his part by transferring the property described therein to the plaintiff in error, and that the latter accepted the conveyance by a resolution of its board of directors entered in its minutes on the books of the corporation; paid the cash, and delivered the stock, according to the terms of the contract, and stipulated in the resolution to immediately deliver the bonds. It was also averred that the bonds had never been delivered, though often demanded; that the affairs of the company were being negligently and fraudulently mismanaged, and that it was insolvent. The petition claimed an equitable mortgage upon the property of the defendant for the amount of the bonds and interest, and also a vendor's lien upon the same, and prayed judgment and foreclosure. There was also a prayer for the appointment of a receiver, and an appointment was made by an interlocutory order. Upon the trial a judgment was rendered in favor of defendant in error, Mary F. Gentry, as administratrix, for the full amount of the bonds and interest, and this was decreed to be a prior lien upon the property of plaintiff in error, which was ordered to be sold by the receiver as special commissioner, and the proceeds paid into court. No appeal having been perfected, the property was sold, and realized the sum of \$140,500. Subsequent to the sale of the property, and a decree distributing the proceeds, this writ of error was sued out.

The petition was excepted to on the ground "that it shows no contract existing between A. M. Gentry and defendant for the payment or delivery by defendant to Gentry of any cash, bonds, or stocks, but that the contract was between said A. M. Gentry and the Texas Western Construction Company, and that plaintiff's right of action . . . is against said construction company, and not against this defendant." This and other exceptions raising the same question were overruled by the court, and that ruling is assigned as error. The conveyance of the property transferred to the defendant by Gentry's deed was certainly a sufficient consideration for its promise to deliver the bonds; and hence we presume the exception is based upon the theory, that Gentry having promised to convey the same property to the construction company, and that contract being still in force, he had no power to convey to defendant. But the construction company could have released Gentry from the agreement which had been assigned to it, or, at least, with Gentry's consent, could have substituted defendant to its rights under the agreement. The petition avers that he "executed the deed to the Texas Western Railway Company at the special instance and request of the Texas Western Construction Company." Such being the fact as admitted by the demurrer, the latter company is clearly precluded from objecting to the conveyance as made. A similar

question is presented by the assignment that the evidence was insufficient to support the finding of the court, because it showed no consideration for the promise of the defendant to deliver the bonds to Gentry. The minutes of the proceedings of the meeting of the directors of the Texas Western Railway Company, relating to this matter, were read in evidence as follows: "Judge Ballinger, as counsel for the Texas Western Construction Company, at the request of the president, explained to the board the nature of the negotiation which had been for some time pending concerning the sale of the Texas Western Narrow-Gauge Railroad, stating that he had prepared a resolution, which, if adopted, would complete the transaction." The minutes then show that the resolution was then read, and was unanimously adopted. We quote a part of the resolution: "*Resolved*, That the Texas Western Railway Company does now make and conclude the purchase from the said Gentry of and acquire the title to all and singular the property and premises, and that the conveyance from A. B. Stone, J. L. Spoffard, and J. C. Chew, styled 'Re-organization Executive Committee,' made the eleventh day of May, 1881, to this company, delivered this day by the said Gentry, and the conveyance from the said Gentry, made third day of June, 1881, to this company, also delivered this day, from him to this company, are hereby accepted as conveyances therefor; . . . that, in consideration therefor, the treasurer of this company shall pay to the said Gentry, [here follows a description of the money and stock to be paid;] that this company will issue, immediately on the execution thereof, and release to the said Gentry, one hundred and sixty thousand dollars (\$160,000) in its first mortgage bonds and forty thousand dollars (\$40,000) in its income bonds, said bonds at par, in accordance with, and in fulfilment of, the terms of the agreement between him and H. H. Honoré assigned to the Texas Western Construction Company." The evidence does not clearly disclose the relations between the construction company and the railway company; but the inference is clear, from these proceedings, that Honoré had assigned his contract to the former for the benefit of the latter, or that some subsequent arrangement had been made by which the railway company had acquired the rights of the construction company under the Honoré contract. At all events, the defendant company, having accepted a conveyance of the property in fulfilment of that contract, and having impliedly asserted the assent or request of the construction company to the arrangement, and having agreed to pay the money, and deliver the stock and bonds, which were agreed to be paid and delivered as a consideration therefor, is estopped to deny the consent of the construction company to the substitution. The agreement to deliver the bonds was the promise of the defendant

corporation, and was supported by a valid consideration, as appears both by the pleadings and evidence; and the court did not err in so holding.

The resolution accepting Gentry's conveyance was passed June 3, 1881, and this suit was instituted June 24, 1884. The statute of limitations of two years was pleaded in the court below, both by exception and by answer, and it is now insisted that the court erred in not sustaining that defence.

Statute of
limitations no
defence.

Contract might
be sued on in
four years.

The minutes of the meeting at which the resolution was passed was signed by the president and secretary of the corporation. A copy, attested and duly acknowledged by the secretary, was delivered to Gentry, and was subsequently placed upon record. The question is, was this "a contract in writing," within the meaning of art. 3205 of the Revised Statutes, upon which an action may be brought at any time within four years? It is held in several cases that a resolution of the board of directors, or other lawfully constituted governing body, of a corporation, duly entered upon their minutes, and signed by the proper officers, if intended as the completion of a contract, is a memorandum in writing as required by the statute of frauds, and that, as such, it can be lawfully enforced. *Argus Co. v. Mayor*, 55 N. Y. 495; *Johnson v. Church*, 11 Allen, 123; *Furnace Co. v. Railroad Co.*, 22 Ohio St. 457; *Tufts v. Mining Co.*, 14 Allen, 411; *Chase v. Lowell*, 7 Gray, 35; *Grimes v. Hamilton Co.*, 37 Iowa, 294. In the few cases which seemingly hold a contrary doctrine, the resolutions were deemed rather propositions for a contract than final acceptances of an agreement. See *Wade v. Newbern*, 77 N. C. 460; *Dunham v. Boston*, 12 Allen, 376; *Flint v. Pierce*, 99 Mass. 69. If a resolution duly entered and signed be a writing under the statutes of frauds, it must be a contract in writing within the meaning of the statute of limitations, where it shows upon its face that it is intended as the final acceptance of a previous agreement. This intention is most clearly expressed in the resolution under consideration. We therefore hold that the action was not barred by limitation.

It is also insisted that the court erred in giving judgment for the plaintiff in the court below, because the evidence showed

Assignment of
right to receive
bonds does not
affect bringing
of suit.

that her intestate had sold the larger part of the bonds in his lifetime. No bonds ever issued, and hence Gentry could not have assigned the bonds themselves. It appears, however, from the evidence that he did assign to different persons the right to each to receive a certain number of the securities. A partial assignment of a chose in action is good in equity, though the legal title remains with the assignor. *Harris Co. v. Campbell*,

68 Tex. 22. But it is well settled in this State that the holder of the legal title of a chose in action may bring suit upon it in his own name, although the equitable right may be in another. *Rider v. Duval*, 28 Tex. 623; *Wimbish v. Holt*, 26 Tex. 674; *Butler v. Robertson*, 11 Tex. 142; *Thompson v. Cartwright*, 1 Tex. 87; *Insurance Co. v. Ray*, 50 Tex. 511. The equitable owner is a proper but not a necessary party, unless the debtor have some legal defence as against him alone. But in this case the petition alleged the insolvency of the corporation, fraud and mismanagement on the part of its officers, and prayed a receiver, and a receiver was appointed. This brought the administration of the entire assets of the corporation under the control of the court. Judgment was given for the plaintiff, and the property ordered to be sold, but the proceeds of the claim sued on were decreed to be held until the parties claiming an interest in the bonds could set up their title to them. The property having been sold, the court proceeded to adjust the equities as between the claimants of the fund, and in its final order distributed it among them; the plaintiff receiving but about one-third of the amount. These distributees are not appealing, and the plaintiff in error cannot complain.

But it is further insisted that the resolution as a contract to issue bonds secured by a mortgage was void, because it was never authorized or ratified by a two thirds vote of the stock of the corporation, as required by our statute. Rev. St. art. 4220. There is some conflict among the authorities upon the question of the validity of the contract of a corporation when made in excess of its powers. When the contract is executed, and the corporation has received the benefit, the weight of authority seems to be that the corporation should be held estopped to deny its authority to make it. *Jones v. Guaranty Co.*, 101 U. S. 622; *Bank v. Matthews*, 98 U. S. 621; *Railway Co. v. McCarthy*, 96 U. S. 258; *Arms Co. v. Barlow*, 63 N. Y. 62; *Perkins v. Railroad Co.*, 47 Me. 573; *Manufacturing Co. v. Canney*, 54 N. H. 295; *Railroad Co. v. Proctor*, 29 Vt. 93; *Bank v. Globe Works*, 101 Mass. 57; *Bank v. Rogers*, 125 Mass. 339; *Railroad Co. v. Transportation Co.*, 83 Pa. St. 160; *Bank v. Hammond*, 1 Rich. Law, 281; *Insurance Co. v. Carrugi*, 41 Ga. 660; *Insurance Co. v. Lanier*, 5 Fla. 110; *Littlewort v. Davis*, 50 Miss. 403; *Underwood v. Lyceum*, 5 B. Mon. 129; *Hays v. Gas-Light Co.*, 29 Ohio St. 330; *Board v. Railway Co.*, 47 Ind. 407; *Darst v. Gale*, 83 Ill. 136; *Thompson v. Lambert*, 44 Iowa, 239; *Foulke v. Railroad Co.*, 51 Cal. 365. The rule is correctly stated in a recent work on estoppel: "Where a contract has in good faith been fully performed, and nothing remains to be

Defendant
estopped to
deny contract,
although ultra
vires.

done by . . . the party seeking relief, and all the stockholders have acquiesced in its performance, the plea of *ultra vires*, or mere want of power, is not available by the corporation in an action brought against it for not performing its portion of the contract. 2 Herm. Est. § 1179, and the numerous cases there cited. There are some decisions which hold that a contract by a corporation *ultra vires* is wholly void, and cannot be enforced either by or against it; but if the contract be within the general scope of the corporate authority, and the prohibition be merely against the mode of its execution, it is valid as against the corporation who has received its benefits, in favor of a party who has fully complied with the obligations on his part. In the case before us the railroad company had power to make a mortgage, but the statute provides it must be authorized by a vote, in meeting, of two-thirds in value of the stockholders. This provision is evidently for the protection of the latter. It seems from the evidence in this case that the defendant corporation was organized for the purpose of extending and operating the railroad acquired, or then about to be acquired, by Gentry. It is fully shown that it made the purchase, promised the bonds and mortgage as a part of the consideration for the property, and had operated the road for about three years when this suit was brought. It does not appear that it ever had any other assets save the property so acquired, and a short extension of the line. Under these circumstances the corporation must be held estopped to deny the want of assent of its shareholders. The promise to make a mortgage under these circumstances is deemed in equity equivalent to a mortgage as between the original parties to the transaction. *Miller v. Moore*, 3 Jones Eq. 431; *Daggett v. Rankin*, 31 Cal. 322.

It is also complained that the court erred in decreeing a foreclosure of the mortgage upon that part of the road which was constructed after the defendant company's purchase from Gentry. The resolution above quoted shows that the bonds were to be issued, and the mortgage executed, "in accordance with and fulfilment of the terms of agreement between him [Gentry] and H. H. Honoré." By this agreement the bonds to be delivered to Gentry were to be secured upon the line of railway then "belonging to the Texas Western Narrow-Gauge Railway Company, and upon such proposed extensions and branches thereof as the company owning and operating the same may elect to include in such mortgages." At a meeting of the stockholders, held after the acceptance of the conveyance from Gentry, the stockholders, by a unanimous vote of all present, a majority in value of the stock being represented, authorized the issue of bonds of the

Foreclosure of
portion of road
constructed
after purchase.

precise character of those agreed to be delivered in the Honoré contract, and directed that they should be secured by mortgages upon "all of the property, rights, and franchises of the company from Houston to Presideo, both that actually constructed and acquired from A. M. Gentry . . . and that to be constructed" by the company. The contract evidently intended that bonds should be used for a much larger amount than was necessary to discharge the obligation to Gentry, and that they should embrace some extension or some branch in addition to the road already constructed and in operation. An extension of the railroad, either upon its main line or upon some one or more branches, was evidently contemplated. There would have been a material difference in value between bonds to the amount of \$18,000 per mile upon the twenty miles of road already built and similar bonds covering a longer line. If the company had projected more than one extension, it certainly had the right to choose upon which to give the mortgage. It could not elect to give it upon neither. Having made but the one extension, this must be held to be embraced in the mortgage which it was Gentry's right to demand. Though the votes of the stockholders at their meeting in 1882 may be insufficient to authorize the execution of a mortgage, yet it shows the contemplated extension, and the property selected by the management for the security of such bonds as they proposed to issue.

The evidence showed, that, although Gentry agreed to convey the property of the Texas Western Narrow-Gauge Company free from incumbrance, that portions of the right of way had not been paid for. A witness testified that it would probably cost \$10,000 to secure so much of this as had not been acquired; but, as to the amount required for this purpose, the evidence is conflicting, other witnesses placing it at a much less sum. It is assigned that the court erred in giving judgment for plaintiff for the full amount of her claim, and in not making a deduction for the unacquired right of way. It was proved, however, that, when the conveyance was accepted, it was known to the directors that all the right of way had not been paid for, and that there were other small claims Gentry had been unable to settle; but that it was agreed that the property should be accepted as it then stood, and that he was to be released from any further obligation to discharge their claims. It also appeared, that, although the road at the time of the trial had been operated for over ten years, yet no one had brought suit for the land over which it was run, or for damages thereto. Having accepted the deed with the full knowledge of the facts, the grantee must await the establishment of claims existing at the time of the

Agreement to
convey property
free from
incumbrance.
Unsettled
right-of-way
claims.

conveyance against the property before it can set up a breach of the warranty. But, if the defendant were entitled to a deduction from the amount of the judgment on account of unadjusted demands for the right of way, this would be no reason for reversing the judgment. All the property of the corporation has been sold to a third party, and the proceeds are sufficient to pay but little more than half of the judgment. The result would have been the same if the recovery had been but for two-thirds of the amount.

Twentieth assignment of error is that "the judgment is contrary to the law, and unsupported by the evidence, in that it finds for and allows plaintiff the full par value of the bonds claimed by her in said petition; whereas, there was no evidence of the value of said bonds, or that said bonds were of any value." The twenty-first assignment raises substantially the same question. The plaintiff did not sue for damages for not delivering the bonds, but for her debt; and, after setting forth all the facts in her petition, she prays for judgment for "interest and principal," and for a foreclosure of her equitable mortgage. If the bonds did not become due upon the payment of the interest, there was, at the time she brought suit, interest due amounting to many thousands of dollars, for which she was entitled to a foreclosure. The proper practice in such a case was to decree a sale of the property, and to apply the proceeds to both the matured and unmatured debt secured by the mortgage. The bonds, if issued, may have been below par in the market; but, as against the defendant, they were evidence of debt to their full amount.

Defendant objects to the consideration of the thirty-first assignment, upon the ground that it was not filed at the time of the filing of the writ-of-error bond as required by the rules. There seems to be some misapprehension in regard to the practice in this matter. We therefore take occasion to say the court does not refuse to consider assignments filed after the filing of the bond, unless it appears that it has operated to the prejudice of the opposing party. Motions to strike them out have been frequently refused by this court in oral opinions. This assignment submits the propositions that the contract sued on is illegal, because it shows upon its face that it is a contract for an issue of stocks and bonds to a fictitious amount, in contravention of the provisions of the statute. We are not prepared to say, from the evidence, that the amounts of stocks and bonds proposed to be issued to Gentry were fictitious. It may be suspected, but we do not think it proved. No issue of this kind was presented in the court below; and, if it could properly be considered here, we

**Judgment for
full par value
of the bonds.**

**Assignments
of error.
Time of filing.**

cannot say that the testimony was sufficient to warrant a finding that the contract was illegal. But, were it so, can the defendant be permitted to set up its illegality, after receiving the property under it, in order to defeat the payment of the consideration? What we have already said we think a sufficient answer to this question. See *City of Natchez v. Mallery*, 54 Miss. 499. We find no error in the judgment, and it is affirmed.

After Acquired Property covered by Mortgage. — See *Mississippi, etc., R. Co. v. Chicago, etc., R. Co.*, 2 Am. & Eng. R.R. Cas. 414; *Hamlin v. European, etc., R. Co.*, 4 Ib. 488; *Coe v. Delaware, etc., R. Co.*, 4 Ib. 513; *Little Rock, etc., R. Co. v. Page*, 7 Ib. 36; *Meyer v. Johnston*, 8 Ib. 584; *Branch v. Jesup*, 9 Ib. 558; *Boston, etc., R. Co. v. Coffin*, 12 Ib. 375; *Mase v. Nichols*, 17 Ib. 230.

To what Mortgage of Future Property applies. — **Effect.** — In equity, future property may be mortgaged. A railway company, under the laws of Louisiana, when authorized to borrow money for construction purposes, may mortgage such property as it may acquire in the future, and as soon as the property is acquired the mortgage operates on it. Obviously, it would be difficult if not impracticable, for a railway company to specifically describe future property that it might acquire. When such property is mortgaged, the mortgage attaches to property subsequently acquired as if it had been described specifically in the act; it is entitled to the same effect in law as if it had been a judicial mortgage. *Parker v. New Orleans, etc., R. Co.*, 33 Fed. Rep. 693.

Provision in Bonds that Railway shall have Option to Pay Interest in Scrip. — **When Option must be Exercised.** — **Demand by Bondholders.** — A railroad company, in a bond issued by it, promised to pay the principal at a specified time and place, "with interest thereon at the rate of seven per cent per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned." The bond also set forth, that the interest was secured by a mortgage lien on the net income of certain specified lines of road; and that, "in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest." A certificate on the bond, by the mortgage trustees, stated that the bond bore "seven per cent interest per annum, payable yearly." The mortgage stated that it was given to secure the payment of the principal and interest of the bonds "according to the tenor thereof." On July 1, 1882 and 1883, the company neither paid the interest in money, nor declared its election to issue scrip for the interest. Shortly after each of those days, it notified the bondholders that it was not prepared to pay interest, as the earnings of the railway were not sufficient. It took no action in reference to the issue of scrip until October, 1883. In a suit by a bondholder, who refused to receive the scrip, to recover the interest in money, *Held*, —

1. If the company did not pay the interest in money by the interest day, it was bound to exercise, by that day, its option to pay it in scrip, and, if it did not, it became liable to the bondholders to pay the interest in money;

2. No demand by a bondholder was necessary, in order to entitle him to the payment of the interest in money, on the failure of the company so to exercise such option. *Texas Pacific R. Co. v. Marlor*, 123 U. S. 687.

COMPTON

v.

WABASH, ST. LOUIS, & PACIFIC R. CO.

(Supreme Court of Ohio, March 13, 1888.)

Mortgage.—Consolidation.—Rights of Bondholders.—In 1862 the Toledo & Wabash Railway Company, formed by the consolidation of a road in this State with one in the State of Indiana, issued \$600,000 of what were termed convertible equipment bonds, payable in 1883, and bearing interest at the rate of seven per cent, payable semi-annually. It operated its road until 1865, when it was consolidated with certain roads in the State of Illinois; the new company being called the Toledo, Wabash, & Western Railway Company. It was stipulated in the agreement forming the basis of the consolidation that these equipment bonds should be “protected” by the new company at their maturity. In 1873 the last-named company, continuing to own and operate its road, issued certain bonds amounting to \$5,000,000, and secured the same by a mortgage upon all its property. Under proceedings begun in 1875, for the foreclosure of this mortgage, in the courts of Ohio, Indiana, and Illinois, the road was sold in 1877 to one Ellis and two others, associated with him, it being especially provided in the decree rendered in the court of the State, — the Common Pleas of Lucas County, — that the sale should be made “without prejudice to any claim which may be made by the holders” of the above-named equipment bonds. The owner of the road at the commencement of this suit — the Wabash, St. Louis, and Pacific Railway Company — derives its title from Ellis and his associates. *Held*, that, under the statute of this State in force at the time the Toledo, Wabash, & Western Railway Company was formed by consolidation (1 Swan & C. 327), and the stipulation in the agreement that these equipment bonds should be protected by the new company, the holders of those bonds acquired the right to require the property of the company that issued them to be applied to their payment; and, the consolidation and the agreement being matter of public record, the right is available against all persons deriving title from the consolidated company.

RESERVED in the District Court of Lucas County. Judgment for plaintiff, affirming the judgment of the Lucas Common Pleas : —

This was an action commenced in the Court of Common Pleas of Lucas County, by James Compton, asking that certain bonds of which he claimed to be the owner, with the unpaid interest coupons thereon, should be declared a lien upon so much of the road of the Wabash, St. Louis, & Pacific Railway Company as formerly belonged to the Toledo & Wabash Railway Company, by whom the bonds had been issued; and for the finding of the amount due him thereon; and an order of sale of so much of its road as is within the jurisdiction of the court, subject to certain admitted prior liens, unless the amount found due him should

be paid by the Wabash, St. Louis, & Pacific Company in a short time, to be named ; and for other relief.

The case, after trial, and judgment in favor of the plaintiff, was appealed by the defendants to the district court, where it was reserved for decision in this court upon an agreed statement of facts, which is as follows :—

On the first day of November, 1862, the Toledo & Wabash Railway Company executed and issued a series of bonds, amounting altogether to the sum of \$600,000, which were styled equipment bonds. The principal of these bonds is due the last day of May, 1883, and they bear interest at the rate of 7 per cent per annum, payable semi-annually in New York City, from and after the first day of May, 1863. A series of interest coupons are attached to each bond. They were put upon the market at the time of their issue, and sold ; and the plaintiff was at the commencement of this suit, and is now, the *bona fide* holder for value of bonds of this series having a par value of \$150,000, upon which no interest has been paid since Nov. 1, 1874, and also of the coupons payable on the said bonds since last-mentioned date. The numbers of the bonds owned by plaintiff are correctly stated in the petition.

The Toledo & Wabash Railway Company, which issued these bonds, was a corporation organized under the laws of the States of Ohio and Indiana, especially the Consolidation Statutes of those States, and owned a line of railway extending from the city of Toledo to State Line City, of Indiana, which railway is now a part of the main line of the Wabash, St. Louis, & Pacific system.

The railroad companies which were united to form this Toledo & Wabash Railway Company were the Toledo & Wabash Railroad Company, an Ohio corporation, and the Wabash & Western Railroad Company, an Indiana corporation. The line of the former company extended from Toledo to Harrison Township, Paulding County, O., and that of the latter company from the State line in Allen County, to State Line City in Warren County, in Indiana.

The Toledo & Wabash Railway Company continued a separate corporation until the year 1865, when it was consolidated with various other companies to form the Toledo, Wabash, & Western Railway Company. The consolidation agreement is dated the twenty-ninth day of May, 1865. Under this agreement the following companies were consolidated : the Toledo & Wabash Railway Company, the Great Western Railway Company of 1859, the Quincy & Toledo Railroad Company, and the Illinois & Southern Iowa Railroad Company. The agreement of consolidation was duly executed and ratified by the stockholders of the various

companies, and was filed in the office of the Secretary of State of Ohio, on the sixth day of July, 1865. It contains the following provisions :—

“Now, therefore, the said companies, by their respective directors, agree to consolidate their roads, property, and capital stock into one company, upon the basis and conditions hereinafter specified, to be submitted by the directors of each of said roads to the stockholders thereof for ratification ; to wit, the Toledo & Wabash Railway Company enters into said consolidation on the following basis, viz., the capital is \$10,000,000, composed as follows :—

“ First Mortgage Bonds	\$3,400,000
Second Mortgage Bonds	2,500,000
Convertible Equipment Bonds	600,000
Convertible Preferred Stock	1,000,000
Common Stock	2,500,000 ”

The contract required the Great Western Railway Company to make a cash payment to the consolidated company, so as to place that road “in equal condition with the Toledo & Wabash Railway Company, as estimated on the 13th of March last, by Messrs. Tilton and Colburn, appraisers appointed for that purpose.”

The agreement especially provided that all the rights, franchises, property, debts, and choses in action of the respective companies should vest in the consolidated company ; and it also contains the following clause :—

“It is further agreed, that the bonds and other debts herein above specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereon, as the same shall respectively fall due, be protected by the said consolidated company, according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced.”

The convertible equipment bonds referred to in this agreement, are the bonds referred to as having been issued by the Toledo & Wabash Railway Company, and as to a part of which this suit is brought. There is no other provision in the consolidation agreement, relating to these bonds, than those just quoted.

The line of railway of the company thus created, extended from Toledo in the State of Ohio, to and through the State of Indiana ; and thence in the State of Illinois to Meredosia, together with certain branch lines.

The new company, the Toledo, Wabash, & Western Railway Company, from this time on had possession of the railroad prop-

erties of the various pre-existing companies, and operated them as a single system of railroads.

On the first day of February, 1867, the Toledo, Wabash, & Western Railway Company resolved to make and issue its bonds to the extent of \$15,000,000, and to secure the same by a mortgage on its entire property; and this mortgage was then made, the trustees for the bondholders named therein being the defendants, Knox and Jesup. This mortgage and the accompanying bonds are known as the consolidated mortgage and the consolidated bonds. It is dated the first day of February, 1867, and was delivered to the trustees therein named, and was forthwith duly recorded. The bonds are also duly made and executed, and a copy of one is found in the mortgage.

The scheme contemplated by the execution of this mortgage was the funding into a single mortgage indebtedness all of the bonds of the pre-existing companies mentioned, whether such bonds were secured by mortgage or not.

It is recited in the mortgage that the property of each of the various companies out of which the Toledo, Wabash, & Western Railway Company was formed, was subject to certain bonded debts and mortgages created by them, amounting in the aggregate to \$13,300,000, and that it was "deemed for the interest of the company, as well as for the holders of all said various classes of bonds, that the whole of the same should be consolidated into one and the same mortgage debt, upon equitable principles."

"And further, for the purposes aforesaid, and for the objects herein stated, the said company, party of the first part, has resolved to make and issue its bonds to the extent of \$15,000,000, and to secure the payment of the same by a mortgage upon its entire property; and that of the amount of said bonds so to be made and issued there should be retained \$13,300,000 to retire, in such manner and upon such terms as the directors of said company may from time to time prescribe, a like amount of the bonds of the various companies herein above enumerated and described, and representing the aforesaid funded debt; and that the balance of said bonds, to wit, \$1,700,000 thereof, should be used to provide the said additional equipment and other improvements hereinabove mentioned, and for such additional purposes as the said directors may deem advisable; and that all of said bonds should be for the sum of \$1,000, except 200, which should be for the sum of \$5,000 each; and that all should bear date on the 1st of February, 1867, and become due and payable in forty years from their date, with interest at the rate of seven per cent per annum, payable quarterly, on the first days of May, August, November, and February, in each year, in the city of New York, and to be all convertible into the common stock of said company

at par, at the option of the holders, at any time within ten years from their date."

The various classes of bonds referred to are specified in the recitals of the mortgage, and among them are the equipment bonds in question.

Consolidated bonds to the amount of \$2,610,000, or thereabouts, were thereafter issued by the company, and no more.

On the sixth day of October, 1868, the Toledo, Wabash, & Western Railway Company entered into an agreement of consolidation with the Decatur & East St. Louis Railroad Company, an Illinois corporation. This agreement was duly executed and ratified by the stockholders of the companies, and was filed in the office of the Secretary of State of the State of Ohio on the 10th of August, 1870. By this means the Toledo, Wabash, & Western Railway Company acquired the railroad property and franchises of the Decatur & East St. Louis Company. After this last consolidation, the company continued its corporate name of the Toledo, Wabash, & Western Railway Company.

It was provided in this agreement that all the property rights, franchises, privileges, property, etc., of the said companies should vest in the consolidated company, and that the terms of consolidation which created the Toledo, Wabash, & Western Railway Company, and which have already been set out, should be and remain in full force, and binding upon the new consolidated company so far as the same could be made applicable, and so far as they are not in conflict with the specific provisions of the agreement of 1868. There is nothing in the last agreement of consolidation conflicting with the provisions in the previous agreement relating to the protection of the bonds therein referred to, including the equipment bonds.

On the first day of April, 1873, the Toledo, Wabash, & Western Railway Company, and Knox and Jesup, the trustees under the consolidated mortgage, entered into a further indenture, and deed of further assurance, as it is called in these proceedings. In this deed of further assurance, the consolidated mortgage, and the purposes for which it was executed, are recited, and it is expressly agreed by the Toledo, Wabash, & Western Railway Company with said trustees, and with all persons whom it may in any wise concern, that the company would not make or issue, or attempt to make or issue, any of the then remaining \$12,300,000 of consolidated bonds, which it is stated remained unissued and reserved, except for the purpose of simultaneously retiring an equal amount of the balance then remaining of the funded debt enumerated in the consolidated mortgage, so that when all of the said reserved bonds should have been used, the whole of the balance of the funded debt would be extinguished; and,

further, that the covenants therein contained should be supplementary to the consolidated mortgage, and constitute a part thereof, and be of the same effect as if they had been inserted therein; and the trustees bound themselves not to sign the trustees' certificate of any of the said reserved bonds except as therein provided.

The object of this deed of further assurance is stated in it to be the desire of the parties, "by more express and specific stipulations than are contained in the said indenture of mortgage, to give assurance to all persons whom it may in any wise concern, that the said reserved bonds shall not, nor shall any or either of them, be used for any other purpose than the retiring of the said funded debt, or some part thereof." This indenture was duly executed by the company and the trustees.

In February, 1875, proceedings were commenced in the Court of Common Pleas of Lucas County, Ohio, and in the proper Indiana and Illinois courts, to foreclose a mortgage, commonly known as the Gold mortgage, executed by the Toledo, Wabash, & Western Railway Company, in February, 1873, to secure the payment of \$5,000,000 of bonds; and a receiver was appointed of the road. This Gold mortgage was executed and recorded prior to the deed of further assurance already mentioned.

In December, 1875, a decree was rendered in the suit in the Ohio court for the foreclosure of the last-named mortgage, whereby all the property and franchises of the Toledo, Wabash, & Western Railway Company were ordered to be sold at a judicial sale. Confirmatory decrees were made by the Indiana and Illinois courts. The property was ordered to be sold subject to the lien of all mortgages and trust deeds prior to the Gold mortgage, including the consolidated mortgage. In the principal decree of foreclosure it was found and stated that the consolidated mortgage was duly and legally made and recorded; that it was a valid conveyance for the purposes therein stated, and as such was a lien upon the property therein described; that it was the first and best lien upon the consolidated lines of railway belonging to the Toledo, Wabash, & Western Railway Company, excepting the branch extending from Decatur to East St. Louis, but inferior to several liens upon separate parts of the road, being the mortgage and liens created by the pre-existing companies, and the same enumerated in the consolidated mortgage, but did not determine the amount or extent of such lien.

The property was sold under the decree by a special master commissioner, on the tenth day of June, 1876, to John W. Ellis and others, a purchasing committee of the Gold bondholders;

and the property sold for an amount less than the amount found due by the decree. This sale was confirmed by this court, and a deed made to the purchasers on the first day of January, 1877, to carry it into effect.

The foreclosure decree made by this court, under which the property was sold, contained the following conditions:—

“And that the sale of said road, property, equipment, and franchises be made, subject to the priority and continuance of said several mortgage liens, and without prejudice to any claim which may be made by the holders of the bonds called equipment bonds, referred to in the petition, as to which all questions arising are left open.”

After the sale of the property and franchises of the Toledo, Wabash, & Western Railway Company, it was re-organized and became the Wabash Railway Company. Ellis and others, committee, who purchased at the sale, organized a company in each of the States of Ohio, Indiana, and Illinois, and then these companies were consolidated into one called the Wabash Railway Company, the articles of consolidation being filed on the tenth day of January, 1877.

On the twelfth day of January, 1877, the said Ellis and his associates transferred the property purchased by them at such foreclosure sale to the Wabash Railway Company. Both the special master commissioner's deeds to the purchasers, and that of the purchasers to the Wabash Railway Company, refer to the decree of foreclosure, and are made subject to the payment of the liabilities charged upon the property by the decree of foreclosure, and to the lien of the consolidated mortgage.

The Wabash Railway Company then took possession of this railroad property, and operated it until its consolidation with the St. Louis, Kansas City, & Northern Railway Company, a corporation organized under the laws of the State of Missouri, to Kansas City, in the same State, with certain extensions and branch lines.

The articles of this consolidation are dated the fourteenth day of August, 1879, and they provide, amongst other things, that, upon the ratification of the agreement by the shareholders of both corporations, all the property rights and franchises belonging to each of the companies should pass to and be vested in the new corporation, whose name should be the Wabash, St. Louis, & Pacific Railway Company. Supplementary articles were entered into by the companies on the tenth day of October, 1879. The consolidation was duly approved by the stockholders of each of the companies, and the articles were filed in the office of the Secretary of State of Ohio on the twenty-fifth day of October, 1879. This last company has since that time owned

and operated all of the said railroad property, and the franchises of the pre-existing companies.

The Toledo, Wabash, & Western Railway Company paid the interest on the equipment bonds as the same matured, up to and including the first day of November, 1874, having thus paid the interest thereon from the year 1865.

The directors of the Toledo, Wabash, & Western Railway Company have never prescribed the manner and terms for the exchange of the equipment bonds for the consolidated bonds, and have never issued consolidated bonds for that purpose, refusing to do this after demand was made upon them; but no demand was ever made by the holder or holders of said equipment bonds, or any of them, until the twenty-ninth day of June, 1875, upon said directors, to prescribe such terms, or to exchange the equipment bonds for those secured by mortgage. That such demand was not made until after the commencement of said foreclosure suit, and the appointment of a receiver therein.

Neither the Toledo & Wabash Railway Company, nor the Toledo, Wabash, & Western Railway Company, own any property, or have any assets; and all of the property, franchises, and assets which they did own, have, through the various proceedings herein set out, passed to and become vested in the Wabash, St. Louis, & Pacific Railway Company.

At the time of the execution of the consolidation agreement of 1865, and of the consolidated mortgage, there were two mortgages upon the property of the Toledo & Wabash Railway Company situated in the State of Ohio, — one for \$900,000, and one for \$1,000,000.

In January, 1877, the Wabash Railway Company executed a mortgage on all its property to one George I. Seney, to secure certain promissory notes, amounting in all to \$1,260,555.42. Some of the promissory notes have been paid, and the plaintiff charges and alleges that the holders of said notes, secured by the Seney mortgage, are chargeable in equity with notice of the lien and equity of the equipment bonds.

In May, 1879, the Wabash Railway Company executed another mortgage on all its property to Solon Humphreys and Daniel A. Lindley, trustees, for the sum of \$2,000,000. This mortgage was recorded in August, 1879. The plaintiff charges that it is inferior to and subject to the lien of the equipment bonds, and that the holders of the bonds which it secures, and the mortgage trustees, are chargeable with notice of the lien or equity of the equipment bonds.

There is unpaid, on the equipment bonds owned by the plaintiff, the coupons that have fallen due since, and including, the first day of May, 1875.

A suit was commenced in this court by the plaintiff herein, against the Toledo, Wabash, & Western Railway Company, to recover a judgment at law on so many of these coupons as matured on and prior to the first day of November, 1879. The defendant appeared, and on the fifteenth day of December, 1880, this court rendered judgment against the said defendant for the sum of \$64,236.16. On the same day the judgment was entered, and returned wholly unsatisfied.

The Wabash Railway Company, and the Wabash, St. Louis, & Pacific Railway Company, have refused payment of these equipment bonds, though retaining the property of the company which issued them.

An application was made to the Supreme Court of this State, at its December term, 1876, by Benjamin F. Ham and others, for a mandamus to compel the Toledo, Wabash, & Western Railway Company to issue, in exchange for certain of these equipment bonds, the bonds mentioned in the mortgage of Feb. 1, 1867, known as the consolidated mortgage, which application was refused by the court.

Certain of the documents and papers referred to in the agreed statement are attached to it; but their substance, so far as they affect the case, is contained in the statement itself.

Wager Swayne, H. S. Greene, and A. W. Hendricks for defendants, appellants.

E. C. Sprague, J. G. Melburn, R. P. Ranney, and George F. Comstock for plaintiff, appellee.

MINSHALL, J. — The principal grounds upon which the plaintiff asserts his right to relief are: (1) the provisions of the statute under which the proceedings in consolidation were had; (2) the stipulations in the agreement forming the basis of the consolidation; and (3) the mortgage executed by the new company in 1867, known as the consolidated mortgage.

1. The bonds owned by the plaintiff, amounting at their face value to \$150,000, were issued by the Toledo & Wabash Railway Company in 1862, were unsecured by mortgage on the property of the company, and the entire series of which they were part were denominated convertible equipment bonds, and amounted to \$600,000, payable in 1883, bearing interest at the rate of seven per cent, payable semi-annually.

The company had been formed by the consolidation of the road of a company in Ohio, with one of a company in Indiana, under the laws of these States, and its road extended from Toledo in the former, to State Line City in

the latter, State. It operated its road until in 1865, when it was consolidated with certain other roads in the State of Illinois, the new company thus formed taking the name of the Toledo, Wabash, & Western Railway Company. The consolidation was had under the laws of the several States in which the constituent roads were located, the statute in this State applicable to the transaction being the Act of April 10, 1856. 1 S. & C. 327. The Act required that an agreement forming the basis of the consolidation should be presented to the stockholders of the respective companies at separate meetings called for that purpose, upon due notice; and then provided that upon its adoption by a vote of two-thirds of the stockholders, the filing of the agreement with the requisite certificate of its adoption, by the secretary of each company in the office of the Secretary of State, and the election of directors by the stockholders of the new company, the consolidation should be deemed complete, and "that all the rights, privileges, and franchises, and all the property of every description of each of the corporations, parties to the same, . . . shall be deemed to be transferred and vested in such new corporation without further act or deed," with this express proviso, "that all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities, and duties of either of said companies shall thenceforth attach to said new corporation, and be enforced against it to the same extent as if said debts, liabilities, and duties had been contracted by it." Whilst the Indiana statute is not so definite in its provisions as to the rights of creditors of the constituent companies as our own, yet an effect has been given it by the construction of its courts that is substantially the same. *McMahan v. Morrison*, 16 Ind. 172; *Indianapolis C. & L. R. Co. v. Jones*, 29 Ind. 465.

Statute
under which
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was had.

What, then, is the sum of the rights of creditors, that, as against proceedings had under it, are to be preserved unimpaired? It is true, that, ordinarily, a creditor has no right that will interfere with that of his debtor to sell and dispose of his property for a valuable consideration, unless he has taken the precaution to acquire some lien upon it, by mortgage or otherwise, as a security in his own behalf. As a rule, the right of an unsecured creditor is confined to the personal obligation and the undisposed of property of his debtor; still, it is not strictly accurate to say that such creditor has no claim upon the property of his debtor; for, in one sense, all the property owned by a debtor, unless exempt by statute from sale on execution, is subject to the claims of his

General
rights of
unsecured
creditors.

creditors, and he cannot dispose of it, unless for a valuable consideration, so as to defeat this right. It is upon this principle that relief is constantly afforded creditors in equity against conveyances in fraud of their rights. Hence the right of a creditor, though unsecured, to maintain an action for a personal judgment, is not the sum of his rights. These may arise from a variety of circumstances, conferring not merely a right to a personal judgment for money, but to have it satisfied from a certain specific property formerly owned by the debtor, irrespective of its acquisition by others. The decease of the debtor, assignments made by him, his bankruptcy, loss of the power to own and acquire property, as, for example, the dissolution of a corporation, or the civil death of the debtor, are some of the most frequent instances in which this right of the creditor has been recognized.

But the question presented here is not general but special. It is, What are the rights of unsecured creditors of an incorpo-

Special question presented. Rights of creditors of consolidated roads.

rated railway company whose entire road and property have been transferred to a new company, formed by its consolidation with other roads under the laws of this State? The general doctrine, that all the property of a corporation is a trust fund for its creditors, and that upon its dissolution they have the right to require that it be applied in payment of their claims, is not controverted by the defendants. There seems to be no conflict in the authorities as to this, and that the right gives rise to an equitable lien upon the property, in favor of the creditor, that is superior to the claims of every one but purchasers for value without notice. Story, Eq. Jur. § 1252; 2 Kent, Com. 307, and note *b*; Morawetz, Corp. §§ 780, 1035; Montgomery & W. P. R. Co. v. Branch, 59 Ala. 153. Nor can there be much question but that by consolidation the prior companies are extinguished for all purposes except to preserve the rights of their creditors, for which purpose they "may," in the language of the law, "be deemed to be in existence." The observation of Mr. Justice Swayne, in construing this statute in *Shields v. Ohio*, 95 U. S. 319 (24 L. ed. 357), that "it was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution," is quite accurate.

It is, however, claimed by the defendants that no new rights are conferred by the statute upon creditors; that if they were unsecured before, they remain such after, the consolidation; and that the new company may deal with the property — may sell or mortgage it — as could have been done, and with like effect, by the former company had it continued the owner thereof. This argument is placed upon two grounds: (1) the assumption

Grounds for defendant's contention that no new rights are conferred on creditors by consolidation.

that the transaction is analogous to a sale ; and (2) that such is the effect of the statute upon all contracts made subsequent to its passage. We will consider them *seriatim*.

The first is, we think, certainly erroneous. Whilst the transaction has some of the features, it is wanting in the essential elements, of a sale. A sale implies a vendor and a vendee, and by it the former sells and transfers a thing that he owns to the latter for a price paid or to be paid to himself. The vendor parts with nothing but his property, and for it receives a *quid pro quo*. Such is not the case where companies are consolidated under this statute. It is true that the owners of each constituent road parts with its property ; but it does much more ; it not only parts with its property, but ceases to be a juristical entity, capable of owning or acquiring property. It does not, and could not, receive any consideration for the transfer, because it is extinguished and dissolved by the act of its stockholders in assenting to the proposed agreement. It is futile to urge that the consideration is received by the stockholders. They are not the corporation, nor do they represent it in its relation to its creditors. "An essential incident of corporations is, that their rights are not vested in the aggregate of individuals, but in the ideal whole, regarded as distinct from the members of which it is composed." Per Mr. Poste, in his edition of Gaius, 154. There has been no relaxation of this principle in its application to the relation of an incorporated company to its creditors. It is the owner in law and equity of all its corporate property ; and it, and not the stockholders, is the debtor in all corporate obligations. Morawetz, Corp. 2d ed. § 227. Moreover, in a consolidation of companies, the stockholders receive no part of the property or assets of their respective companies : these pass to the ownership of the new company. All that the stockholders of either of the old companies receive is stock in the new company, in exchange for what they held in the former company. We must look elsewhere for analogies to the transaction, whereby, through consolidation, a new company acquires the property of certain old ones. We are not without such analogies. They are to be found in the numerous instances in ancient and modern law, where, to use the terminology of the Roman civil law, a *universitas juris* is transferred. The term expresses the legal conception of a university or bundle of rights and liabilities belonging to one person, and constituting, as it were, his legal personality ; and where these are transferred by one and the same act to another, the latter is said to acquire *per universitatem* ; that is, he becomes clothed with the rights and legal duties of the individual to whose personality he succeeds. Among some of the leading

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instances of such acquisition are: (1) a succession to an inheritance by an heir — somewhat obscured in the common law by its division between the heir and the personal representative of the deceased (Maine, *Ancient Law*, 160); (2) where, by adrogation, one not under power became the son of another, and the *adrogator*, by the diminution of the status of the *adrogatus*, or adopted son, acquired his property and, by prætorian law, became liable for his debts to the extent of the property so acquired; (3) coemption, where the husband acquired by the marriage the property of the wife, and by a remedy furnished by the prætor, was made liable for her debts in the same manner as in the case of adrogation. And in the common law may be suggested, not merely the case of an inheritance transmitted by the death of the ancestor, but also the estate of one regarded as *civiliter mortuus*, which was transmitted and administered upon as that of a person in fact deceased. And the succession of an assignee in bankruptcy to the entire property of a bankrupt is, as observed by Mr. Maine, a modified form of a universal succession. And he says, "Were it common among us for persons to take assignments of all a man's property on condition of paying all his debts, such examples would exactly resemble the universal succession known to the oldest Roman Law." Maine, *Ancient Law*, 180.

In all these cases the point most to be observed is the extreme care of the law to secure the rights of creditors. The case of an inheritance is familiar, and needs little or no comment. The creditors of the deceased are regarded as having a lien upon the property of the deceased, and this is secured to them through the methods of administration; and so in the case of those regarded as being civilly dead, for example, in the case of a monk, the individual, in anticipation of becoming a "monk professed," could make a will and appoint his own executor, but if he did not, administration was awarded by the ordinary, as upon the estate of one in fact deceased. 1 Bl. Com. 132. For some reason, not well understood, neither the adrogator nor the husband in a marriage by coemption was, by the ancient civil law, liable to creditors for the death of the person thus reduced to their power. But a remedy was provided at an early period through an action given by the prætor, in which, by a fiction, the former status of the debtor was deemed to continue, and thus, like all fictions introduced to favor the remedy, could not be disputed, and preserved the rights of the creditor as against the property of his debtor. Gaius, Poste's ed. Bk. III., § 84; Bk. IV., § 38, and comments by Poste, p. 521; Just. Ins. Bk. III., tit. x., §§ 1-3; Hunter, *Roman Civil Law*, 2d ed. 741. And it is worthy of note, in this connection, that our statute regulating

proceedings in consolidation provides, that, to preserve the rights of creditors, "the respective corporations may be deemed to be in existence." It thus appears to be a principle of universal law that the death, real or supposed, of an individual possessed of property and owing debts, gives to his creditors a right to have his property applied to the satisfaction of their claims. It is not a *jus in re* nor a *jus ad rem*, but a charge in the nature of an equitable lien upon the property, available against all purchasers with notice. The reason underlying the principle upon which the law proceeds in all this class of cases, is that the debtor does not merely part with his property and rights, but also loses his capacity to own and acquire property; and all that is left the creditor upon which he trusted his debtor — property constituting the principal ground of credit in all cases — is the property that his debtor owned, and to that he has the right to look for the satisfaction of his claim, the person whom he trusted having ceased to be. It is no answer to this to say, that the new company is required to assume the payment of the debts of the old companies. I am aware that the convenience of trade and commerce has so changed the ancient doctrines of the common law, that a debtor may be required, in a variety of instances, to accept as a creditor one with whom he did not in fact contract; but I know of no instance in which it can be said that a creditor can be compelled to accept a new debtor in the place of the one to whom he extended credit. It is impossible to perceive how this could be done without impairing the obligation of the contract. The company with which he dealt may have possessed ample means to discharge all its debts; the new one may, by reason of the debts of other companies, be hopelessly insolvent; and to compel him to accept it as a general creditor, might be but another mode of robbing him of his credits.

2. The claim is, however, that such is the effect of the statute under which the consolidation was had, and, having been in force at the time the equipment bonds were issued, entered into the contract and became a part of it. It is difficult to perceive how this claim can be maintained in the face of the language of the statute heretofore quoted, — "that all rights of creditors . . . of either of said corporations shall be preserved unimpaired." There is no question but that every statute enters into and forms part of any contract to which it is applicable, as a part of the law of the land; but it is not perceived how, in the application of this rule, a contract may be impaired or in any way affected by proceedings had under a statute, which by its terms excludes any such effect. The proposition involves a contradiction in terms. The only question that can be raised in such a case is,

Statute had no such effect on contracts made subsequent to its passage.

whether a particular effect claimed for a proceeding had under the statute will, or not, impair the contract of a creditor; and an answer to the question in the affirmative must be fatal to the claim. No reason is perceived why a different intention should be imputed to the Legislature in the enactment of this law. The object of the Legislature in authorizing the consolidation of railway companies, was, as we apprehend, not to enable the new company to obtain credit by impairing the security of existing creditors of either of the former roads, but to enable existing companies to unite and form a continuous line of railway, under one corporate management, between widely separated points of trade and commerce; and as this could be attained without impairing the rights of creditors of the constituent roads, a court might well hesitate to so construe the statute, if its provisions were silent on the subject. It would seem to be quite as consistent with a wise public policy to preserve the foundations of commercial credit, as to promote the formation of great lines of interstate commerce; both may be necessary to the interests of commerce, but the one not more than the other.

This view is much strengthened by the further provisions as to the rights of creditors, that "the respective corporations shall be deemed to be in existence to preserve the same." How, for this purpose; shall they be deemed to be in existence as legal entities, — with or without property? Manifestly in the former sense, for the existence of a corporate entity without property wherewith to answer claims against it, would be of no avail to a creditor, a judgment against it would be without fruit. The clause was inserted in the interests of creditors, and the only interpretation that can be of any avail to them cannot be rejected without doing violence to well-settled rules of construction. The statute introduces a fiction, much as the prætor did in favor of the creditors of an *adrogatus*, and we see no reason why it was not intended to answer substantially the same purpose. In a suit by a creditor, the company, though in fact dissolved, is to be deemed in existence, and a judgment in his favor, whether against it or the new company, is to be satisfied from the property owned by the old company at the time of consolidation, as if such proceedings had never been had; the fact of consolidation is pushed aside, and no one will be permitted to question the fiction until his rights have been satisfied. Of this no one, as a creditor of the new company, can in justice complain. The lien is a result of the proceedings under which the new company acquired its title to the property; and of it, creditors of the new company have, in law, the same notice they have of prior mortgages upon the same property.

The former decisions of this court do not affect the question

as to the rights of creditors. They are simply to the effect that the statute becomes a part of all subscriptions to the capital stock of a company made subsequent to its passage, so that the same may be recovered in a suit by the consolidated company, brought for that purpose. *Mansfield, C. and L. M. R. Co. v. Brown*, 26 Ohio St. 323. The rights of a stockholder are preserved by giving him an election to become one in the new company, or of declining and being paid the highest market value of his stock, at any time within the six months next preceding the making of the agreement; but unless he does so previous to the consolidation, he is treated as a stockholder in the new company: and this fact accentuates the construction claimed for creditors. As no voice is given them in the transaction, it is but reasonable that their rights should be in no way affected by it.

3. The plaintiff does not, however, base his claim to relief solely upon the provisions of the statute, but likewise upon the effect of the stipulation in the agreement, forming the basis upon which the consolidation was had, — that the class of bonds owned by him should be protected, both as to interest and principal, as the same should mature, by the new company. The principle upon which this claim is based is, that, where the property is transferred upon the condition that the grantee shall pay some third person a debt or sum of money, the latter acquires an equitable lien on the property, to the extent of the debt or sum of money to be paid him. This principle is well recognized, and has been applied in a great variety of cases. A masterly treatment of the doctrine by Ranney, J., will be found in *Clyde v. Simpson*, 4 Ohio St. 445. See also Story, Eq. Jur. §§ 1244–1246; Pom., Eq. Jur. §§ 166, 1234; *Montgomery and W. P. R. Co. v. Branch*, 59 Ala. 139; *Hamilton v. Gilbert*, 2 Hiesk. 680; *Vanmeter v. Vanmeter*, 3 Gratt. 148.

Stipulations in agreement forming basis of consolidation.

It is true that most of the instances in which this lien has been recognized is where property had been devised charged with the payment of debts or legacies to others, and for the plain reason that the most frequent occasions for its application will arise in such instances, and not because the principle is in its nature inapplicable to other transfers of property; for as is said by Ranney, J., *Clyde v. Simpson*, *supra*, a “doctrine resting upon the broad foundations of justice and conscience” cannot be made “to depend upon the manner in which the title is derived.” No such limitation has been placed upon the doctrine by the courts or text-writers. Story, Eq. Jur. § 1246.

In *Vanmeter v. Vanmeter*, *supra*, it appears that a grantor had made a conveyance of all his real estate in consideration of one dollar and the agreement of the grantees to pay his debts and a

certain legacy ; this was held by the court to constitute a lien upon the property in favor of the creditors. . Many similar instances will be found among the cases cited ; and, independent of the provisions of the statute, we are unable to see why the principle when applied to the facts of this case does not create a similar lien in favor of the holders of these equipment bonds. It would seem to follow, as a corollary, from what has been said as to the lien based upon the provisions of the statute. Whatever may be urged against the claim that the agreement to protect these bonds imposed the duty of securing them by mortgage or otherwise, the least that can be claimed is that it imposed the duty of paying them, interest and principal, at maturity. And as all the property of the company issuing them was transferred upon the basis of this agreement, the transfer was upon the stipulation to pay his claim as a part of the consideration thereof. If, for the purpose of withdrawing from the cares of business, or any other reason, a private person were to make a conveyance of all his property to another upon the agreement of the latter to pay his debts, it will not be questioned but that such transfer would create an equitable lien upon the property in favor of creditors, that would avail against all persons with notice. This case is every way analogous to such transfer, and no reason exists why it should not be governed by the same principles, so far as the rights of creditors are concerned. The only difference between the *r  al* and the supposed case strengthens the reason of its application to the real one. In the supposed case, the person making the transfer may still own and acquire property ; but in the real one, as heretofore shown, the debtor terminates its personality, and can no longer own or acquire any thing. All that is left the creditor is the property that it owned, and unless we disregard all the analogies of the law, this property must be charged with its debts in the hands of one that succeeded to its place in consideration of the agreement to pay them, and the lien so created must be superior to the title of all purchasers with notice.

In the decree for the foreclosure of the mortgage executed by the consolidated company in 1873, known as the Gold bond mortgage, it was ordered that the sale of the road, etc., should be made "without prejudice to any claim which may be made by the holders of bonds, called equipment bonds, referred to in the petition" (being the class of bonds owned by the plaintiff), and that as to these all questions arising were to be left open." So that, as the Wabash, St. Louis, & Pacific Railway Company derives its title to the property and road, against which the plaintiff asserts his rights, under the purchase made by Ellis and his associates at the judicial sale in which this reservation was

made, it follows that whatever rights the plaintiff had as against the Toledo, Wabash, & Western Company, and its creditors, may be asserted against the Wabash, St. Louis, & Pacific Company, and those claiming under it. No question of laches can arise, as the principal of the bonds did not mature until 1883, or after the bringing of this suit.

It seems, therefore, unnecessary to consider whether the plaintiff would be entitled to the benefit of the security known as the consolidated mortgage, executed by the Toledo, Wabash, & Western Railway Company in 1867, for the purpose of retiring its bonded indebtedness. This has been constantly refused the holders of these equipment bonds; and, as they are now due, the plaintiff is entitled to a finding of the amount due upon the bonds held by him, and an order for the sale of so much of the road as is within the jurisdiction of the court, unless paid in a short time, to be named.

The conclusion here reached finds direct support in the cases of *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 139, and *Tysen v. Wabash R. Co.*, 15 Fed. Rep. 763, and in the text of *Morawetz, Corp.* § 809. In a note by the reporter, to *Tysen v. Wabash R. Co.*, it is said that a motion for a rehearing was overruled by Justices Wood and Harlan. An effort has been made to distinguish the Alabama case on the suggestion that in it the indebtedness may have been contracted before the passage of the statute under which the consolidation had taken place. But this is not correct, as the statute was passed in 1860, and the indebtedness was contracted in 1866 and 1870. Our conclusion is, however, opposed by the decision of the Supreme Court of the United States in the *Wabash, St. L., & P. R. Co. v. Ham*, 114 U. S. 587; s. c., 26 Am. & Eng. R. R. Cas. 66. Respect for the authority of that court has delayed the decision in this case from the time it was reached upon the docket, — over a year since; but, after the most careful consideration, we are unable to adopt its conclusions; and in construing a statute of our own State, deem it our duty to adopt that construction which, in our judgment, most accurately expresses the intention of the Legislature.

Judgment for the plaintiff, finding the amount due him, and order of sale.

Williams, J., dissents.

Rights of Bondholders after Consolidation. — See *Rosencrans v. Lafayette, etc., R. Co.*, 16 Am. & Eng. R. R. Cas. 483.

Bonds of Old Company as Lien on Road after Consolidation. — See *Wabash, etc., R. Co. v. Ham*, and note 26 Am. & Eng. R. R. Cas. 66-74.

Laches of Stockholders objecting to Foreclosure of Consolidated Mortgage Bonds. — A consolidation of several railroad corporations was made July 1, 1882, and a mortgage executed upon all the roads. This mortgage was fore-

closed, and a sale about to be had, when stockholders of certain of the roads, who had so far opposed none of the proceedings, came into equity April 14, 1887, asking for an injunction, and praying that the mortgage be annulled, on the ground that the consolidation was fraudulent. *Held*, that the complainants were guilty of laches, and that the bill should be dismissed. *Bell v. Pennsylvania S. & N. E. R. Co.* (N.J.), 10 Atlantic, Rep. 741.

NEW ORLEANS PACIFIC R. CO.

v.

UNITED STATES.

(124 *United States Reports*, 124.)

Land Grant. — Duty of Railroad to pay Cost of Surveying before receiving Patent. — Under the provision of the Act of July 31, 1876, c. 246, 19 Stat. 121, "That before any land granted to any railroad company by the United States shall be conveyed to such company, or any person entitled thereto under any of the Acts incorporating or relating to such company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest," the New Orleans Pacific Railway Company, as the owner, by conveyance from the New Orleans, Baton Rouge, & Vicksburg R. Co., of its interest in the land grant made to the latter company by § 22 of the Act of March 3, 1871, c. 122, 16 Stat. 579, was bound to pay the cost of surveying the land, before receiving a patent for it, although such cost had been incurred and expended by the United States before March 3, 1871, the construction of no part of the road having been commenced before the expiration of the five years limited for the completion of the whole of it.

APPEAL from a judgment against the petitioner in the Court of Claims. The case is stated in the opinion of the court.

John S. Blair, John F. Dillon, and Wager Swayne for appellant.
Attorney-General and *Assistant Attorney-General Howard* for appellee.

BLATCHFORD, J. — This is an appeal by the New Orleans Pacific Railway Company from a judgment of the Court of Claims dismissing its petition, on a demurrer thereto, after it had failed to amend the petition in accordance with leave granted to it by the court.

The substantial allegations of the petition are these: The petitioner is a corporation of Louisiana. The New Orleans, Baton Rouge, & Vicksburg Railroad Company was incorporated by Louisiana in 1869. By sect. 22 of an Act of Congress passed March 3, 1871, c. 122, 16 Stat. 579, there were granted to the New Orleans, Baton Rouge, & Vicksburg Railroad Com-

pany, its successors and assigns, in aid of the construction of its railroad from New Orleans to Baton Rouge, thence by the way of Alexandria, in the State of Louisiana, to connect with the Texas Pacific Railroad Company at its eastern terminus, the same number of alternate sections of public lands per mile, in the State of Louisiana, as were, by the same Act, granted in the State of California to the Texas Pacific Railroad Company; and it was provided that said lands should be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as was provided for and required from the Texas Pacific Railroad Company within the State of California: "*Provided*, That said company shall complete the whole of said road within five years from the passage of this Act."

By sect. 9 of the same Act, there was granted to the Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad in California.

Sect. 12 of the same act provided as follows: "That whenever the said company [the Texas Pacific Railroad Company] shall complete the first and each succeeding section of twenty consecutive miles of said railroad, and put it in running order as a first-class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to, and co-terminus with, said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this Act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and, when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from pre-emption, private entry, and sale."

On the 11th of November, 1871, the New Orleans, Baton Rouge, & Vicksburg Company filed in the Department of the Interior a map of the general route of its road from Baton Rouge to Shreveport, and on the 13th of February, 1873, a like map showing the general route of its road from New Orleans to Baton Rouge. In 1871 and 1873 the lands along said general route, within the grant of the Act of March 3, 1871, were withdrawn from entry and sale by order of said department. On the 5th of January, 1881, the petitioner became the owner, by conveyance from the New Orleans, Baton Rouge, & Vicksburg

Company, of all its interest in such grant of public lands ; and the conveyance and its acceptance by the petitioner were duly recognized by the Department of the Interior. After Jan. 5, 1881, the petitioner constructed 260 miles of the railroad from Shreveport, by way of Alexandria and West Baton Rouge, to White Castle, in Louisiana, within the limits of the lands withdrawn for its grantor, and substantially upon the course, direction, and general route of the road filed by such grantor.

On the 13th of March, 1883, the Secretary of the Interior transmitted to the President of the United States a report in writing of the commissioner appointed by the President to examine said 260 miles, and recommended that they be accepted, and that patents for such lands as might have been earned by their construction be issued to the petitioner. This recommendation was approved in writing by the President ; and on the 3d of March, 1885, patents were issued to the petitioner for 679,284.64 acres of lands in Louisiana, as earned by the petitioner. Before issuing the patents, the Secretary of the Interior exacted from it \$14,713.63, alleging the same to be due for the cost of surveying the lands, although such cost had been incurred and expended by the United States prior to March 3, 1871. The petitioner denied the right of the United States to that sum, and paid it under protest. The petitioner prayed judgment for that sum.

The question in the case is as to the effect of a statutory provision enacted July 31, 1876, c. 246, 19 Stat. 121, in "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes," in these words : "*And provided further*, That before any land granted to any railroad company by the United States shall be conveyed to such company, or any person entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest."

Statute
relating to
cost of survey,
etc.

We are of opinion that this provision of the Act of 1876 controls the present case, and is conclusive against the right of the petitioner to recover the money in question. At the time this Act was passed, neither the petitioner nor its grantor had acquired any right to claim the lands granted. The five years from March 3, 1871, within which, as a condition, the whole of the road was to be completed, had elapsed without the commencement of any part of the work of construction. That was not

Statute is
conclusive
against
petitioner's
right to
recover.

begun until nearly ten years after the Act of March 3, 1871, was passed. The petitioner accepted the conveyance from its grantor with full knowledge of the provision of the Act of 1876. Congress had a right at that time to impose upon the grant the new condition, the company having failed to complete the whole of the road by March 3, 1876.

The restriction in the Act of 1876, that the provision for the payment of the cost of surveying the land shall not apply to a company which is "exempted by law from the payment of such cost," does not apply to the case of the petitioner. There is no express statutory provision exempting the grantor to the petitioner from the payment of the cost of surveying the land. All that can be said is, that the Act of March 3, 1871, was silent on the subject. It neither exempted the beneficiary from paying the cost of surveying, nor did it expressly require it to pay such costs. It and its grantee, therefore, fall within the provision of the Act of 1876, because not within the exception contained in that provision.

Restriction in
Act of 1876
does not apply.

It is urged for the appellant, that, in the present case, the surveys had been made and paid for by the United States prior to the passage of the Act of March 3, 1871; and that, as sect. 12 of that Act provided for the issuing of patents without requiring the payment of the cost of surveying, the company was therefore "exempted by law from the payment of such cost," within the meaning of the provision of the Act of 1876; and it is suggested that no statute, in respect to the granting of public lands to either a State or a railroad company, passed prior to 1876, contained a provision expressly exempting the grantee from the payment of the cost of surveying. It is further urged, that the terms of the provision of the Act of 1876 are not intended to apply to then existing grants, but only to future grants, and to the cost of surveys to be made thereafter.

But we are of opinion that the provision is a general one, and that, although it is enacted in connection with an appropriation of money for the survey of public lands and of private land claims, and follows a requirement that no patent shall issue for a private land claim until the cost of survey and platting shall have been paid into the treasury by the party in interest, yet it is not controlled by those circumstances. It is manifestly general legislation, applying, as to the past, to all land theretofore "granted to any railroad company by the United States," and to the cost of surveying such land, whether that cost had been previously incurred or expended, or was to be incurred or expended in the future. The exception created, that the provision is not to apply to a company exempted by law from the payment of

Act applies to
existing as well
as to future
grants.

the cost, is general in its language. If such a company is to be found, the exception applies to it; if it is not to be found, the provision applies to it.

It is urged for the appellant, that inasmuch as sect. 17 of the Act of March 3, 1871, provided, in regard to the Texas Pacific Railroad Company, that, upon the failure to complete its road within the time limited by that Act, Congress might adopt such measures as it might deem necessary and proper to secure the speedy completion of the road; and, inasmuch as that Act contained no reservation of a power to add to, alter, amend, or repeal its provisions, Congress was restricted, on a failure of the New Orleans, Baton Rouge, & Vicksburg Company to complete the whole of its road within five years from the passage of the Act, to the adoption of measures for the securing of a speedy completion of the road, and that the imposition upon the company of the cost of surveying the land was not such a measure.

But we are of opinion, that while, on the failure of the company to complete its road within the time limited, Congress might adopt measures to secure its speedy completion, no limitation was imposed on the right and power of Congress, the company having failed even to commence the construction of any part of its road within the time limited, to virtually renew the grant and extend the time within which the land might be earned, with the imposition of a new condition, that, before any patent should be issued, the cost of surveying the land patented should first be paid into the treasury.

In the case of *Farnsworth v. Minnesota & Pacific Railroad Co.*, 92 U. S. 49, it was held by this court, that, where a grant of land and connected franchises is made to a corporation, for the construction of a railroad, by a statute which provides for their forfeiture upon failure to perform the work within the prescribed time, the forfeiture may be declared by legislative act, without judicial proceedings to ascertain and determine the failure of the grantee; and that any public assertion by legislative act of the ownership of the State after the default of the grantee is equally effective and operative. See also *McMicken v. United States*, 97 U. S. 204, 217, 218.

In the present case, it is true that the statute did not provide for the forfeiture of the grant on failure to complete the whole of the road within the five years; but within the principle of the case referred to, Congress was left free, on a failure of the grantee to do any of the work within the five years, to impose the condition it did upon

**Adoption by
Congress of
measures to
secure speedy
completion of
road.**

**Authorities :
*Farnsworth v.
Minnesota &
Pac. R. Co.***

**Other
authorities.**

the grant of the lands. As was said in *Farnsworth v. Minnesota & Pacific Railroad Co.*, the Act having made the construction of the whole of the road within five years a condition precedent to a patent for any of the land granted, no conveyance in disregard of that condition could pass any title to the company, as was held in *Schulenberg v. Harriman*, 21 Wall. 44. It follows that Congress had the power, after the lapse of the time during which the right to any conveyance could have been earned, to impose a condition upon which such right could be earned in the future. The application by the petitioner for a conveyance or patent must be taken as an assent by it to the condition imposed by the Act of 1876.

The same principle was applied in *United States v. Repentigny*, 5 Wall. 211. In *Railway Co. v. Prescott*, 16 Wall. 603, it was held by this court, that the twenty-first section of the Act of July 2, 1864, 13 Stat. 365, amendatory of the Act of July 1, 1862, 12 Stat. 489, to aid the Kansas Pacific Railway in the construction of its road by the grant of lands, which amendatory section required the prepayment of the cost of surveying, selecting, and conveying the lands, required the prepayment as to lands granted by the original Act, as well as to those granted by the amendatory Act. It was contended by counsel in that case, that, as the original Act required no such prepayment, the United States could not, in disregard of the statute which made the grant, annex new conditions to it by a subsequent enactment. But this court said (p. 608), "We are of opinion that no patent could rightfully issue in any case until the cost of survey had been paid. None of the road had been built when the amendatory Act was passed. No right had vested in any tracts of land; and the power, as well as intent, of Congress to require such payment cannot be contested."

The same statutory provisions were under consideration in *Railway Co. v. McShane*, 22 Wall. 444. In that case, in reference to the provision of sect. 21 of the Act of 1864, this court said (p. 462), "That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the Government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done, without which the company is not entitled to a patent."

This view was affirmed in respect to like statutory provisions concerning the Northern Pacific Railroad Company, in the case of *Northern Pacific Railroad Co. v. Traill County*, 115 U. S. 600; s. c., 25 Am. & Eng. R. R. Cas. 364, where, by an Act passed in 1870, Congress had provided that before any land granted to the

company by the United States should be conveyed, there should first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same.

These views seem to us to be decisive in the present case, and the judgment of the Court of Claims is affirmed.

Who may question Validity of Land Grant assigned by Grantee company. — When previously Imperfect Grant acquires Precision, and Attaches. — Where lands have been granted *in presenti* to a railway company to aid its construction, and Congress afterwards allows the grantee to assign the lands to another company, the Government, but not the latter company, might have questioned the title on the ground that the grantee has failed to perform the conditions imposed in the grant. When a grant of lands *in presenti* is made to a railway company, and a map designating the route is filed in the proper office, title to the lands, previously imperfect, acquires precision, and attaches to the lands. *Parker v. New Orleans, etc., R. Co.*, 33 Fed. Rep. 693.

Effect on Land Grant of Amendment to Articles of Incorporation. — The original articles of association of the Southern Pacific Railroad Company of California did not specify, as one of the objects of the incorporation, the construction of a line of railroad from Tehachapi Pass to the Colorado River, in the southeastern part of the State; but, at the time of the passage of the Act of Congress of 1871, incorporating the Texas Pacific Railroad Company, there was in force the Act of the Legislature of California of March 1, 1870, authorizing any corporation then existing, or thereafter to be formed, to amend its articles of association, by making and filing amended articles in the same office where the originals were filed; also, a statute authorizing railroad corporations to consolidate with each other. And the articles of association of said company were amended immediately after the passage of the Texas Pacific Act, so as to embrace the road therein provided for in the objects of the corporation, and the company consolidated with other companies in pursuance of the statute. The road constructed as provided for in the Texas Pacific Act was thereafter completed in accordance with the provisions of the Act. *Held*, that the proceedings were valid, and the road afterwards built was constructed in pursuance both of the laws of California and of the Acts of Congress, and that the title to the lands granted vested in the Southern Pacific Railroad Company of California, as it existed after the amendment of its articles of association, and its consolidation with other roads. *Southern Pac. R. Co. v. Poole*, 32 Fed. Rep. 451.

Effect of filing Map of General Location. — The filing of the map of general location of the line of the road, by the Southern Pacific Railroad Company of California, in pursuance of the Act of Congress, inured to the benefit of the Southern Pacific Railroad Company of California, as it existed after its consolidation, and the amendment of its articles of association, as the successor in interest of the corporation, as it existed at the time of the passage of the Act of Congress, and of the filing of said map, even if the two corporations cannot be considered as technically the same corporation. *Southern Pac. R. Co. v. Poole*, 32 Fed. Rep. 451.

Grant of Right of Way over Public Lands authorizing Company to take Materials for Construction. — The Act of March 3, 1875 (18 Stat. 482), grants the right of way to certain railway companies over the public lands, and authorizes any of such companies "to take" the material necessary for the construction of its road from the public lands "adjacent" to the line thereof. *Held*, (1) That the Act is a license to the company "to take" the material necessary for the construction of its road without application to, or consent of, any officer of the land department, and that such department has no authority

to make any regulations on the subject of such license; (2) If the company takes such material from the public lands not adjacent to the line of its road, or takes more than is permitted by the statute, it is liable to the United States as a wrong-doer; (3) Any person who has a contract with the company to build its road, or any part thereof, or to furnish material therefor, is, without any special agreement to that effect, so far authorized to take the necessary material from the public land the same as said company might do; (4) If a person not in the employment of the company, and having no contract therewith, cuts timber off the lands adjacent to the line of its road, and the company acquires the same for the purpose of constructing its road, and so uses it, neither such person nor company is liable therefor as a wrong-doer; (5) The license to take material for the construction of the road includes the right to take material for the construction of station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, and the like; (6) Land is adjacent to the line of the road, within the purpose and intent of the Act, when, by reason of its proximity thereto, it is directly and materially benefited by the construction thereof. *United States v. Chaplin*, 31 Fed. Rep. 890.

Land Grant is a Contract not to be impaired. — Act Tex. Feb. 4, 1856, granting the Memphis, El Paso, & Pacific Railroad Company all vacant lands within eight miles of the extension line of its road, upon which the company invested its money, is a contract within the protection of that clause of the United States Constitution prohibiting a State from passing any law impairing the obligation of contracts, and was therefore not affected by Const. Tex. 1869, art. 10, § 5, declaring said lands open to purchasers, settlers, locators, and holders of genuine certificates. *Houston & Texas Cent. R. Co. v. Texas & Pac. R. Co. (Tex.)*, 8 S. W. Rep. 498.

What is Sufficient Designation under Land Grant Act. — A designation of lands under Act Tex. Feb. 4, 1854, incorporating the Memphis, El Paso, & Pacific Railroad Company, and granting it all vacant lands within eight miles on each side of the extension line of its road, is sufficient which describes the line of the road as extending from a given point, a certain course and distance, to another point, and affords all information necessary for the exact location of the line, though no actual survey was made, under sect. 15 of said Act, which provides that all the vacant public land within eight miles of each side of the extension line of said road shall be exempt from location or entry from and after the time when such line shall be designated by survey, recognition, or otherwise. *Houston & T. C. R. Co. v. Texas & P. R. Co. (Tex.)*, 8 S. W. Rep. 498.

CINCINNATI, HAMILTON, & INDIANAPOLIS R. Co.

v.

CLIFFORD.

(*Indiana Supreme Court, Feb. 28, 1888.*)

Amendatory Act requiring Construction of Railroad within Certain Time. — **Validity.** — Where an original Act incorporating a railroad company, and an amendatory Act requiring it to commence the construction of the road within four years, and to complete it within ten, are both passed at the same session of the Legislature, with an interval of four days elapsing between them, and

there is no acceptance of the provisions of the original Act, nor any rights acquired under it during the interval, the amendatory Act is valid.

Failure to complete Railroad in Time required. — Private Party cannot take Advantage of. — Thirty-six years after the expiration of the time fixed for the completion of a railroad, the plaintiff, in a possessory action brought for a strip of ground over which the road had been constructed, cannot avail himself of the failure of the corporation to complete its railroad within the time required by an Act amending its Act of incorporation.

Entry by Railroad. — Remedy. — Change of Statute. — An entry made by a railroad company upon land after the change of a statute must be governed by the statute as it existed at the time of the entry. So far as the remedy is concerned, the law then in force rules the case.

Bill of Exceptions. — Act of Incorporation. — An Act of incorporation declared to be a public one need not be incorporated in a bill of exceptions. The public laws of the State are before its courts without being pleaded or inserted in a record.

Survey does not show Acquiescence in Entry. — The fact that a survey was made on a person's land by a railroad company does not establish his acquiescence in an entry by the railroad for the purpose of constructing its road.

APPEAL from a judgment of the Fayette Circuit Court, Swift, J., against the defendant in a possessory action to recover land. Reversed.

The facts are stated in the opinion.

R. D. Marshall and *W. C. Forrey* for appellant.

Reuben Conner and *Hyatt L. Frost* for appellee.

R. D. Marshall for appellant in reply.

ELLIOTT, J. — The appellee in his complaint asserts a right to the possession of 120 acres of land, and avers that the appellant has possession of it without right. The complaint seeks possession of the land, and not compensation, except in so far as damages are an incident of the right of possession. The action must therefore be treated as purely a possessory one; and on that theory, we must examine and decide all the questions presented by the record.

The second paragraph of the answer of the appellant alleges, that on the eleventh day of February, 1848, the General Assembly passed an Act incorporating the Junction Railroad Company, and authorizing it to construct a railroad from Indianapolis, Ind., to Hamilton, O.; that it located its road through the appellee's land soon after the Act was passed, and, pursuant to the power conferred by its charter, took a strip of ground one hundred feet in width; that the Junction Railroad Company and the appellant, as its successor, have since been in possession; that the appellee had full knowledge of the entry and seizure, and did not file any claim for damages as required by the charter of the corporation.

To this answer the appellee replied these facts: The General Assembly, on the fifteenth day of February, 1848, passed an Act

requiring the Junction Railroad Company to commence the construction of its railroad within four years from that date, and to complete it within ten. Neither the Junction Railroad Company, nor the appellant as its successor, did begin the construction of the railroad within ten years. The entry was not made until 1867. No compensation was paid the appellee by either of the corporations.

The contention of appellant's counsel is, that the reply is bad, for the reason that the amendatory Act of Feb. 15, 1848, is in conflict with the Constitution.

The general rule undoubtedly is, that after vested rights have been acquired, the charter of a corporation cannot be so amended as to impair those rights unless the power to amend or repeal is expressly reserved. The rule that a charter granted to a private corporation is a contract, has a firm place in our jurisprudence; and to that rule courts must yield. But in stating the general rule, and affirming its validity, we do not decide the question which here faces us. An element enters here not usually found in the adjudged cases. The original Act and the amendatory Act were passed at the same session of the General Assembly. An interval of only four days elapsed between the adoption of the original Act and the adoption of the amendatory Act. There was no acceptance of the original Act, and no rights were, so far as the record discloses, acquired under it prior to the passage of the Act amending it.

Amendatory
Act valid.

Our conclusion upon this point is, that where the original and amendatory Acts are both passed at the same session, with an interval of four days elapsing between them, and there is no acceptance of the provisions of the original Act, nor any rights acquired under them during that interval, the amendatory Act is valid.

The rule forbidding the amendment or repeal of charters granted to private corporations rests upon the theory that vested rights will be destroyed, and the obligations of a contract impaired, by the amendment or repeal. At the foundation of the rules is the assumption that the charter is a contract. With the fall of this assumption falls the rule. This assumption must fall unless there be present the elements of a contract. The absence of these elements saps the foundation, which alone gives support to the rule. In this case those elements are absent.

Much older and quite as well settled as the rule prohibiting the repeal of charters, is the rule that private organizations cannot be compelled to accept a charter. No association can be created into a private corporation by the Act of the Legislature alone. Public corporations may be created by the Legislature without the consent of the corporators; private corporations

cannot be so created. Acts constituting an acceptance must be performed before the Act of the Legislature is transformed into a contract. Until there is an acceptance, either by express words or by conduct, the Act of the Legislature is nothing more than a mere proposition. Through all the law of contracts runs the principle that a proposition may be modified or withdrawn before it is accepted. This principle applies to propositions from the sovereign as well as from the citizen. In support of our conclusion, we refer to *State v. Dawson*, 16 Ind. 40; *Field, Corp.* § 30.

We are, however, unable to find any principle upon which the appellee can take advantage of the failure of the corporation to commence or complete its road within the time prescribed by the Act of Feb. 15, 1848. The lapse of time, and the intervention of other rights than those of the corporation, make it doubtful whether the State could take away the corporate rights of the successor of the original corporation; but, however this may be, a private citizen cannot accomplish that object by a possessory action. It was more than thirty years after the expiration of the time fixed for the completion of the railroad before the right of the appellant was assailed. We are entirely clear that the appellee, at least, cannot avail himself of the failure of the corporation to complete its railroad, and wrest from it the possession of the strip of land occupied by it for the purpose of maintaining and operating its railroad. Even had there been no acquiescence on the part of the appellee or the State, the former could not have availed himself of the failure of the corporation to perform its duty. That duty was owing to the State, and not to individuals; and the State alone has the right to enforce that duty, or sue for its breach. It would be subversive of principle, and productive of great evil, to permit private citizens to recover possession of land, and thus break the line of a railroad engaged in the public service, upon the ground that the corporation had not done what the law required it to do, unless what it was required to do affected private rights. Principle and authority are against the appellee upon this point. *Logan v. Vernon, G., & R. R. Co.*, 90 Ind. 552; s. c., 14 Am. & Eng. R. R. Cas. 43, and cases cited. *Jussen v. Lake County*, 95 Ind. 576.

It would be strange indeed if a citizen could bring an action in ejectment, and, upon the ground that the corporation had not performed a duty due from it to the State, wrest from it a strip of ground forming part of its roadway, and acquired by it under color of authority conferred by its charter. Our argument, it is true, proceeds upon the assumption that the duty enjoined by the amendatory Act was owing to the State, but the assumption

Plaintiff cannot take advantage of failure of corporation to construct road in time.

is so plainly just that it cannot be controverted. All that need be done to establish it is to affirm what no one will deny, — that so far as concerned any private rights, except those of the corporation, the Legislature might at any time have relieved the corporation from the duty, enjoined by that Act, of completing its road within ten years from the passage of the law. If it could do this, then it is perfectly clear that no citizen had any private right that could constitute the foundation of an action; for, if he had, the Legislature could not take it from him. Doubtless private rights may be granted land-owners by a corporate charter, but no such rights are created by the amendatory Act of Feb. 15, 1848.

The reply is not made good by the allegation that neither the appellant nor its predecessor begun the construction of a railroad within four years after the passage of the amendatory Act, nor is it made good by the allegation that the railroad was not constructed within ten years from that time. But we think it may be sustained on other grounds. The answer pleads as a defence the failure of the appellee to demand compensation in the manner prescribed by the charter of the Junction Railroad Company. This is the theory of the pleading. There is no claim of license, nor any claim that compensation was paid; the sole claim is, that there can be no recovery, because the land-owner did not file his claim for compensation with the secretary of the corporation, as the special charter provided. We are strongly impressed with the belief that the answer is bad, for we cannot perceive upon what principle a right of entry could accrue before payment or tender of compensation. This, as it seems to us, was a condition precedent, which it was beyond the legislative power to exempt the corporation from performing. But, waiving the question of the sufficiency of the answer, and, for the purpose of this discussion, conceding its sufficiency, we adjudge the reply to be good. We rest our conclusion on the fact that the reply avers that there was no entry until 1867. So far as the remedy is concerned, the law then in force rules the case. The principle is well settled that a remedy may at any time be changed by the Legislature. A change in the form of the remedy is not an encroachment upon a vested right, for the plain reason that no one can have a vested right in a remedy. In this instance there was a change, both by the Legislature and by the Constitution of 1851, in the form of the remedy. Indeed, it may well be doubted whether, under the present Constitution, there can be a special remedy where the right is a general one. It is, however, only necessary for us to decide that there was a change in the remedy, and that the Legislature had the constitutional power

Change of
remedy by
Legislature
valid.

to make the change. In *Maynes v. Moore*, 16 Ind. 116, the court quoted with approval Judge Story's statement, that "no one will doubt that the Legislature may vary the nature and extent of remedies, so, always, that a substantial remedy exists." In many cases this rule has been asserted and enforced. By other courts it is recognized, and by them it has been applied to such cases as this. *McCrea v. Port Royal R. Co.*, 3 S. C. 381; s. c., 16 Am. Rep. 729; *Baltimore & S. R. Co. v. Nesbit*, 51 U. S. (10 How.) 395; *Spring Valley Water Works Co. v. Schottler*, 110 U. S. 347; s. c., 2 Am. & Eng. Corp. Cas. 122; *Long's App.* 87 Pa. 114; *State v. Weldon*, 47 N. J. L. 59; s. c., 54 Am. Rep. 114.

If the appellee, under the law as it existed at the time of the entry on his land, had a right to sue for possession, the provision

**Remedy
at time entry
was made may
be invoked.**

in the charter of 1848 ceased to be exclusive, even if it ever possessed that character. The remedy at the time the entry was made may be invoked, for it was then that the cause of action accrued. The law then in force authorized an action for possession. The

law as it then was, and still is, may be thus stated: When a railroad corporation enters upon land without right, it is a trespasser; and an action may, if reasonably prosecuted, be maintained against it to recover damages resulting from the trespass. If the entry is without right, and possession is wrongfully withheld, an action for possession will lie, unless, by some act or some omission, the land-owner has precluded himself from asserting his right to possession. The counsel for appellant is therefore in error in assuming that the only remedy of the land-owner is that given by statute. He is not confined to that remedy, but, in the proper case, may prosecute an action for damages or for possession. *Indiana, B., & W. R. Co. v. Allen*, 12 West. Rep. 887, and cases cited; *Indiana, B., & W. R. Co. v. Allen*, 12 West. Rep. 910; *Midland R. Co. v. Smith*, 12 West. Rep. 699; *Pittsburgh, Ft. W., & C. R. Co. v. Swinney*, 97 Ind. 586, and cases cited. The general right to maintain ejectment exists in all such cases, but it is a right that may be lost by acquiescence, and perhaps in other ways.

The appellee's counsel insist that we cannot consider the question sought to be presented on the instructions, because

**Act need not
be in bill of
exceptions.**

the evidence is not in the record. In support of this general proposition, it is said that the Act of 1848 is not in the bill of exceptions, although referred to by the bill. This proposition is not tenable. That Act is declared to be a public one, and there was therefore no necessity for incorporating it in the bill of exceptions. The public laws of a State are before its courts, without being pleaded or inserted in a record.

A much more formidable reason, however, is adduced in support of this general position, and authorities are cited that sustain it. We are referred to the record, showing that an exhibit was introduced in evidence; and it is also shown that this exhibit is not in the bill of exceptions. We cannot ignore the fact that there was an exhibit put in evidence, for the record expressly declares that it was; nor can we overlook the fact, so strongly pressed upon our attention, that the exhibit thus made an instrument of evidence is not properly in the record. If it had not been put in evidence, although referred to by the witnesses, a different question, requiring a different ruling, would be presented; but it was put in evidence. It is true that there is an exhibit attached to the record, but it is not in the bill, nor is provision made for it by the words "here insert;" it only appears as a paper attached to the record, and appears, too, after the certificate of the clerk. The authorities settle this question against the appellant, and we must yield to them. *Irwin v. Smith*, 72 Ind. 482, 486, 487, and cases cited; *Chambers v. Butcher*, 82 Ind. 508; *Sanders v. Farrell*, 83 Ind. 28, and cases cited; *Brehm v. State*, 90 Ind. 140; *Cincinnati, H., & I. R. Co. v. Butler*, 103 Ind. 31-36; s. c., 23 Am. & Eng. R. R. Cas. 262; *Marshall v. State*, 107 Ind. 173, 176.

**Exhibit
attached to
record not
in bill of
exceptions.**

We cannot say that the instructions were not proper under a state of facts relevant and material under the pleadings; and we cannot, in the absence of the evidence, examine them for any other purpose. It has long been the rule in this State, that, if the evidence is not in the record, the court will not reverse, if, upon any supposable state of facts relevant to the issue, the rulings of the court were right. *Hunt v. Adamson*, 2 Ind. 641; *Baltimore, O., & C. R. Co. v. Rowan*, 104 Ind. 88; s. c., 23 Am. & Eng. R. R. Cas. 390, and cases cited.

**Evidence not
in bill of
exceptions.
No reversal.**

The claim of appellant, that it is entitled to judgment on the answers of the jury to interrogatories, cannot be sustained. It is well settled that the judgment must go upon the general verdict, and not upon the answers, unless there is an irreconcilable conflict between them. It is equally well settled that no presumption will be indulged in aid of the answers; but, on the contrary, that reasonable intendments will be made in favor of the general verdict. *Greenfield v. State*, 12 West. Rep. 713, and cases cited; *Chicago & E. I. R. Co. v. Ostrander*; s. c., 32 Am. & Eng. R. R. Cas. 361, and cases cited; *Rice v. Evansville*, 108 Ind. 7, and cases cited.

**Judgment must
go upon gen-
eral verdict.**

If the answers of the jury showed that the appellee had

acquiesced in the occupancy and use of his land for a considerable period, and until after the public had acquired rights, we should hold that he could not maintain this action. *Indiana, B., & W. R. Co. v. Allen, supra*, and cases cited; *Mills, Em. Dom.* 140. But the answers do not show that there was ever any railroad constructed on the appellee's land; much less do they show any acquiescence. It is true that they show that a survey was made, but it is well settled that an entry for that purpose does not entitle the owner to maintain an action. From such an entry no right of action accrues. *Mills, Em. Dom.* 2d ed. § 36. But if they did show an entry, it would not be enough, for it must further be shown that there was a use and an acquiescence. It is true, also, that the answers show the use of lands near those of the appellee, but they show no such use of appellee's land. The truth is, that the interrogatories were framed upon the theory that the failure to demand compensation in the manner prescribed by the Act of 1848 deprived the appellee, both of his land and his right to compensation; and the answers elicited do not state facts sustaining the theory of acquiescence now put forward by the appellant's counsel. If the original theory had been sound, the answers might have been of benefit to the appellant; but it is not, and the answers do not sustain the theory now advanced.

The verdict of the jury reads thus: "We the jury find for the plaintiff, and assess his damages at \$42." The appellant's counsel insist that this verdict is insufficient, and that the motion for a *venire de novo* should have been sustained. We so hold. There is some conflict in the authorities as to whether the verdict should prescribe the property in ordinary possessory actions. *Sedg. & W. Land Titles*, §§ 497, 498. We do not, however, enter this field of conflict, for the reason that the case before us presents unusual features. The complaint claims title to 120 acres of land, but the other pleadings show that only a narrow strip is in controversy. This appears also from the answer to the interrogatories. It was legally impossible, therefore, for the court to render the proper judgment, and a verdict not sufficient for this purpose must be set aside. The Code provides that the judgment "shall conform to the verdict," and that it "shall clearly specify the relief granted." *Rev. Stat.* 1881, §§ 564-579. In a case like this, these requirements of the law cannot be carried into effect unless the verdict describes the property. This objection is not answered by the cases which hold that where the defendant appears and answers he admits that he was in possession of the land claimed. *Holman v.*

Fact that
survey was
made will not
establish
acquiescence.

Variance be-
tween amount
of land claimed,
and that shown
to be in con-
troversy by
pleadings.

Elliott, 86 Ind. 233 ; Voltz *v.* Newbert, 17 Ind. 187. These cases simply enforce a plain statutory provision, but they do not meet the question here presented. The question here is, What must the verdict contain in order to enable the court to pronounce judgment upon it? In pronouncing judgment, the court must look to the pleadings and other parts of the record, as well as to the verdict ; and, unless the verdict authorizes the court to specify the relief granted, it cannot be sufficient. We are unable to perceive how it is possible to specify the relief which the record requires, without a more definite verdict.

The provision of the Code referred to in the cases cited does not, in reality, apply directly to the verdict, although it may do so incidentally ; for it simply declares that "where the defendant makes defence, it shall not be necessary to prove him in possession of the premises." **Sect. 1056 of Code applies directly to evidence.** Rev. Stat. 1881, § 1056. This provision applies directly to the evidence, and it is only by construction that it can be made to do more. We do not believe any principle will justify us in extending it beyond matter of evidence in such a case as that before us, if, indeed, it be proper to do so in any case.

One great requisite of a judgment in an action for the possession of land is, that the description shall be so specific as to enable the sheriff to put the plaintiff in possession. Loard *v.* Philips, 4 Sneed (Tenn.), 566. It is difficult to perceive how a judgment could be framed upon a verdict such as that before us, that would enable the sheriff to do this ; and, if no such judgment can be framed, then the verdict must be defective, for the judgment must follow the verdict. Baughan *v.* Baughan, 12 West. Rep. 925. We can see no escape from the conclusion, that the verdict, as the record presents this particular case, is radically defective.

Judgment reversed, with instructions to sustain the motion for a *venire de novo*.

Charters of Corporations may be amended by Special Acts. — Hodges *v.* Baltimore, etc., R. Co., 10 Am. & Eng. R. R. Cas. 270.

Cause of Forfeiture cannot be taken advantage of collaterally. — Nothing is better settled than that a cause of forfeiture of a charter or franchise cannot be taken advantage of in a collateral proceeding. Logan *v.* Vernon, 14 Am. & Eng. R. R. Cas. 440 ; Attorney Gen'l *v.* Chicago, etc., R. Co., 26 Am. & Eng. R. R. Cas. 428 ; Stults *v.* East Brunswick, etc., Turnpike Co., 17 Am. & Eng. Corp. Cas. 232 ; State *v.* Woodward, 4 Am. & Eng. Corp. Cas. 53.

Unauthorized Preliminary Survey confers no Rights as to Location of Road. — New Brighton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 25 Am. & Eng. R. R. Cas. 158 *n.*

When Entry on Land will be restrained by an Injunction. — Entering upon land, and removing soil from one portion thereof to another, and proceeding

to grade for a railroad track, and threatening to complete the construction of the track thereon, present such a case of threatened irreparable injury to the freehold and of the possibility of a multiplicity of suits for each trespass committed by the movement of trains, as will warrant the issuance of an injunction to restrain such acts pending legal proceedings for a determination of the title to the land. *Newall v. Staffordville Gravel Co.*, 11 Cent. Rep. 606.

INDIANA, BLOOMINGTON, & WESTERN R. CO.

v.

MCBROOM.

(*Indiana Supreme Court, March 10, 1888.*)

Railroad Grade. — Notice to Purchaser. — A prospective purchaser of land upon which a grade for a railroad is constructed is warned thereby that there is some claim of right, and if he fails to make proper inquiry he buys at his peril.

Ejectment. — Acquiescence. — A railroad was completed in 1870 upon the grade seen by a purchaser at the time he bought the land in 1859, and there was acquiescence until March, 1886. *Held*, that there can be no recovery in ejectment against the railroad company, although its deed was not recorded until twelve years after the plaintiff's purchase.

APPEAL from a judgment of the Warren Circuit Court, Snyder, J., against defendant in an action in ejectment. Reversed.

The facts are stated in the opinion.

Nebker & Dochterman and *C. W. Fairbanks* for appellant.

No brief for appellee.

ELLIOTT, J. — In January, 1855, Eli Wood was the owner of the strip of land of which the appellee seeks to secure possession by ejecting the appellant. On that day Wood conveyed the land to the Newcastle & Danville Railroad Company. This deed was not recorded until Sept. 13, 1872; and before that time, July 25, 1859, Wood conveyed the tract of land through which the strip runs, to the appellee. Work was done — by cutting trees and the like — on the strip of ground embraced in Wood's deed to the railroad company as early, at least, as November, 1857. The appellant succeeded to the rights acquired by the Newcastle & Danville Railroad Company, and it completed and equipped its railroad from Indianapolis, Ind., to Peoria, Ill., in the year 1870, and has operated it since.

The appellee, in his testimony, says, "At the time that Wood conveyed to me, there was a strip cut through the timber, and

there were ditches. I had no doubt but this work was grade for a railroad."

We regard it as quite clear, that, upon the uncontroverted facts, the appellee has no right to recover possession of the land; and that is the question before us, for we are not met with any question as to his right to recover compensation.

At the time he bought the land he knew that the grade for a railroad track was constructed, and this was sufficient to put him upon inquiry. *Paul v. Connersville & N. J. Co.*, 51 Ind. 527; *Jeffersonville, M., & I. R. Co. v. Oyler*, 60 Ind. 383. A person who is about to purchase land upon which a grade for a railroad is constructed, is warned that there is some claim of right; and, if he fails to make proper inquiry as to the nature of the claim, he buys at his peril. A man cannot buy property where there are facts known to him sufficient to put him upon inquiry, and hold it free from prior claims or equities, of which due inquiry would have given him information. *Wilson v. Hunter*, 30 Ind. 472; *Singer v. Scheible*, 109 Ind. 575.

Grade was
notice to
purchaser.

This familiar and long-settled rule is thus well stated in a recent case: "A party in the possession of certain information will be charged with a knowledge of the facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him." *Ellis v. Horrman*, 90 N. Y. 473.

But in this case we have the further fact, that the railroad was completed, upon the grade seen by the appellee at the time he bought the land in 1859, as early as 1870, and that there was acquiescence until March, 1886, when this action was brought. The law is decisively against the appellee. *Cincinnati, H., & I. R. Co. v. Clifford*, *ante* p. 8; *Indiana, B., & W. R. Co. v. Allen*, 12 West. Rep. 887; *Midland R. Co. v. Smith*, Id. 699; *Evansville & T. H. R. Co. v. Nye*, Id. 727.

Acquiescence
defeats claim.

Judgment reversed.

Purchaser of Land on which Railroad Grade is constructed is put upon Inquiry.—A railway company entitled by contract to a deed for a definite strip of ground for a right of way, completed its track along said strip, near its centre, and was in actual possession and use of said track. *Held*, such possession included so much ground (not adversely held by another), upon either side of said track, as was reasonably necessary for the convenient use and maintenance of the railway, in the customary mode, and was constructive notice, to a subsequent purchaser, of the actual equitable title of the railway. *Day v. New York, etc., R. Co.*, 20 Am. & Eng. R. R. Cas. 359; and see *Dudley v. Toledo, etc., R. Co.*, 30 Am. & Eng. R. R. Cas. 230.

License and Acquiescence in Occupation of Land bars Action of Ejectment.—Where a railroad company enters upon land without the consent of the owner, but under a subsequent parol license continues to occupy and use

it, and completes its road over the same, and operates it for many years, and continues to operate it, an action in ejectment to recover the land will not lie, although no compensation has been paid, the proper remedy being an action for compensation by way of damages. *Evansville & Terre Haute R. Co. v. Nye*, 113 Ind. 223. See also *Omaha, etc., R. Co. v. Redick*, 17 Am. & Eng. R.R. Cas. 107.

ST. JULIEN

v.

MORGAN'S LOUISIANA & TEXAS R. & S. S. Co.

(*Louisiana Supreme Court, Dec. 5, 1887.*)

Action against Railroad. — Venue. — The Legislature, in granting to the defendant company immunity from suit elsewhere than at its domicile, for causes of action other than trespass, designed to restrict the character of suits, not brought at the place of domicile, to actions of tort for wrongs committed, and its *unlawful* entry upon the lands of citizens *vi et armis*.

Definition of Trespass. — Trespass is an unlawful act committed with violence upon the property or rights of another. An action of trespass is that which is instituted for the recovery of damages for a wrong committed with immediate force.

Effect of Land-Owner permitting Railroad to occupy his Land without Complaint. — In case the owner of the land permits its use and occupancy by a railroad corporation, and the construction thereon of a *quasi* public work, without resistance or complaint, he cannot thereafter require the demolition thereof nor prevent its use by such corporation.

Same. — Action of Trespass for Damages. — Venue. — Such owner is not debarred of his action for compensatory damages if instituted at the domicile of the company; but he cannot affect to treat such entry as tortious, and sue it as a trespasser at the place where the injury is alleged to have been sustained.

APPEAL from District Court, parish of La Fayette; C. De Bail-
lon, Judge.

Suit in damages for trespass, instituted by J. G. St. Julien
against Morgan's Louisiana & Texas Railroad & Steamship
Company.

M. E. Girard for plaintiff and appellee.

Henry L. Garland and *Leovy & Blair* for defendant and appel-
lant.

WATKINS, J. — The demands of the plaintiff are founded upon
the reservation in his favor contained in our decree in the pre-
vious suit between the same parties. 35 La. Ann.

Facts.

924. He claims of the defendant company the sum of
\$3,911.50, as compensatory damages, and which may be correctly
itemized as follows; viz., —

(1) Value of land taken	\$1,087 50
(2) Cost of fences	500 00
(3) Injury to 100 acres of land	500 00
(4) Value of embankment	1,824 00
	<hr/>
	\$3,911 50

In the court *a quo* the case was tried by a jury, and they found a verdict in favor of the plaintiff for cost of fences and hedge, \$500, but disallowed the remainder of his demands as presented. The defendant appeals. *In limine*, the defendant company filed an exception to the jurisdiction of the court, on the ground, that, under its charter, suit could not be brought against it elsewhere than at its domicile, the city of New Orleans, for other cause of action than *trespass* (sect. 12, Act 37, Reg. Sess. 1877); and that the claim herein made did *not* confessedly arise from a *trespass* committed by the company on the person or property of the plaintiff, as will appear from the petition. The exception was overruled by the judge *a quo*; and the correctness, *vel non*, of his ruling, must be first ascertained and decided. In making the exception, defendant relied upon the provision of its charter contained in sect. 12, as restricting the right to sue it elsewhere than at the place of its domicile, to actions of trespass; and as taking said company, in all other respects, out of the operation of Code Pr. art. 165, pars 8, 9.

In *State v. Judge*, 36 La. Ann. 977, we held the company's act of incorporation to be a private statute, and not a public law; and that the word "trespass," as employed therein, was "employed in the broadest sense, so as to comprehend a variety of wrongs, having the common element of *a use of force*, whether direct or indirect." In the more recent case of *Heirs of Gossin v. Williams*, 36 La. Ann. 187, we said of the same statute, "It is evident that the Legislature, by granting to the company immunity from suit out of New Orleans, its legal domicile, *except in cases of trespass*, meant to confer some privilege or advantage which otherwise would not have existed. The design was clearly to restrict the character of suits, *not* brought at the place of domicile, to cases of *trespass*." Though it cannot be said to have, in any legal sense, repealed the article of the Code of Practice, it did have the effect of relieving the corporation from the effect of those provisions conferring jurisdiction on the judge of the place where the property is situated, to try and determine suits for damages *other than for trespass*. In the opinion last quoted from, we also treated of the action of trespass as contemplated by the defendant's charter, and said, "Trespass is defined to be *an unlawful* act committed with violence, *vi et armis*, on the person,

Venue of
actions of
trespass.
Definition.

property, or relative rights of another. An action of trespass is that which is instituted for the recovery of damages for a *wrong* committed against the plaintiff, with immediate force" (p. 188). Our predecessors, in construing Code Pr. arts. 165, 169, employed similar language: "The Legislature contemplated the *active* violation of some right, or the doing of some *illegal* thing, acts of *commission* which give rise to an action for damages, and that the rule does not apply to *omission*, neglect, or failure to do. Wrongs of this class are excluded by the words 'commit' and 'committed,' . . . and which necessarily imply action." *Montgomery v. Levee Co.*, 30 La. Ann. 609; *New Orleans v. Bank*, 31 La. Ann. 566.

The plaintiff does not, in his petition, class or style this as an action of trespass. In our previous opinion (35 La. Ann. 924), the character of his original suit was fully examined and defined, and the reservation in his favor clearly outlined. It was regarded and treated as one possessing some of the characteristics of a petitory action for the recovery of certain lands occupied and used by the defendant as a roadbed for its railway, claiming that it had entered thereon in July, 1879, without his permission, and without purchasing or appropriating it, and for rents and revenues. After carefully reviewing the evidence, we said, "It is unnecessary for us to say or intimate how or whether he could have been protected had he done more than talk to a lawyer. Certain it is, he did not invoke the arm of the law at the time it could have been of service to him, but, on the contrary, acquiesced in the defendant's taking possession and using his property; encouraged it to prosecute its work, by abstaining from every attempt to prevent it; and made no complaint in a court of law of the injuries inflicted upon him until the defendant had expended large sums of money in completing it. Having thus permitted the use and occupancy of his land, and the construction of a *quasi* public work thereon, without resistance, or even complaint, he cannot afterwards require its demolition, *nor prevent its use*, nor treat the company entering it as his tenant. He is not barred from an action for damages by reason of the taking of the land, and for its value; *but having acquiesced in the entry, and encouraged* if he did not invite it, *he cannot affect to treat it as tortious*. Considerations of public policy, not less than the suggestion of natural justice, require that, in such case, the owner shall not be permitted to reclaim his property free from the servitude he has permitted to be imposed upon it, but shall be *restricted to compensation*."

The taking possession of plaintiff's land was not accomplished by a resort to violence, nor through the commission of a wrong,

a tort, or other illegal act. The plaintiff not only did not make resistance to the entry of the defendant, but acquiesced in it, and encouraged it to construct its railway thereon. He cannot now prevent the defendant's use of it, nor treat it as a trespasser in so doing. In support of the views expressed by the court, the opinion quotes the following very pertinent paragraph from *Pierce on Railroads*; viz., "If the company had made an *unlawful* entry to construct its road, it would be liable in *an action of trespass* for the injury accruing therefrom, and the satisfaction of that judgment would not have the effect of making the appropriation legal, as would the payment of the award, in proceedings for condemnation; but the company would remain liable to *successive actions of trespass for the continuing nuisance*, or to successive actions for the recovery of rent for the continuing use of the land" (pp. 169, 230). Hence the defendant is not liable in an action of *trespass* for the injury accruing for its use, but may be sued only for compensation. The opinion also quotes, with favor, *Mills on Eminent Domain*, who says, "Slight acts of acquiescence on the part of the owner will estop him from interfering with the running of a railroad. He will not be deprived of his claim for damages, or his right to enforce it in all proper modes; but if he has *in any sense*, for the shortest period, clearly given the corporation, either by his express consent or by his silence, to understand that he did not intend to object to their proceeding with the construction and operation, he cannot, on non-payment of compensation, maintain ejectment. If there was, in fact, a waiver, either express or implied, by acquiescing in the proceedings of the company, to the extent of not insisting upon prepayment as a condition precedent, but consenting to let the damages lie and remain a mere debt, with or without a lien upon the roadbed, *then it is impossible to regard the corporation in any sense in the light of a trespasser, or liable to ejectment*" (sect. 140). The converse of that proposition is clearly stated in *Salt Lake City v. Hollister*, 118 U. S. 256, in which the Supreme Court held that a railroad company, authorized to acquire a right of way by the exercise of eminent domain, which *seizes* upon the land of a citizen, makes no compensation, and takes no steps for its expropriation, is a *naked trespasser, and can be made responsible for a tort*." The two are easily reconcilable, and are reconciled on the theory of our opinion.

Defendant
not liable to
action of
trespass, but
may be sued for
compensation.

In that case, the plaintiff's demand for ejectment was refused, because the entry of the defendant on the plaintiff's land was with his consent or acquiescence. The logical deduction from that decree is that plaintiff has no right of action for trespass; and had only reserved to him therein an action for compensatory

damages for the value of his land, and the injury he may have suffered by the taking of it.

The plaintiff's suit should have been instituted at the defendant's domicile. The exception to the jurisdiction of the court should have been sustained, and the suit dismissed. It is therefore ordered, adjudged, and decreed, that the verdict of the jury be set aside, and the judgment appealed from annulled; and it is now ordered, adjudged, and decreed, that the defendant's exception to the jurisdiction of the court *a quo* be sustained, the suit dismissed, and that all costs be taxed against the plaintiff and appellee.

Effect of Acquiescence by Land-Owner in Occupation of Land.— See *Indiana, B., & W. R. Co. v. McBroom*, and note, *ante*; *Thornton v. Sheffield & Birmingham R. Co.*, and note, *infra*.

BROCK

v.

OLD COLONY R. CO.

(*Massachusetts Supreme Judicial Court, Feb. 28, 1888.*)

Location of Railroad.— **Identification of Land.**— **Name of Owner.**— *Mass. Rev. St. c. 39, § 75* is satisfied if the location of a railroad, as filed, identifies the land; and the name of the owner of the land need not be stated therein.

Notice to Owner presumed.— **Personal Notice by Name.**— Notice required by statute to the owner of land included within a railroad location, of a petition for authority to take land, will be presumed. It is not necessary that all the land-owners should be notified personally by name.

Location.— **Failure to furnish Owner with Plan.**— A railroad company's title to land is not affected, nor the running of the time for applying for damages suspended, by the failure of the company to furnish the owner of land taken by it with a plan of the location.

On demandant's appeal. Judgment affirmed.

This was a writ of entry for a parcel of land in Stoughton, and was submitted upon an agreed statement of facts, the substance of which was as follows:—

The tenant disclaims title to the demanded premises, except a right to occupy and use the same for railroad purposes under the location hereinafter mentioned.

On Sept. 27, 1854, plaintiff owned a tract of land in Stoughton which was bounded on its easterly side by land of O. Ames & Sons.

The Easton Branch Railroad Company, to whose rights and liabilities the defendant has succeeded, was incorporated by the Acts of 1854, c. 55, and on Sept. 27, 1854, filed the location of its railroad in the office of the county commissioners of the County of Norfolk. A plan accompanied, and made part of, said location. By said location and plan the plaintiff's name did not appear as one of the persons whose land was taken in and by said location, though the name of O. Ames & Son did so appear; but by an application of the monuments, boundaries, courses, and distances given in said plan and location to the land itself, it appears that the plaintiff's land, above described and sued for in this action, was included in said location.

The Easton Branch Railroad Company afterward constructed its road over the land described in its location, but did not, before doing so, furnish the plaintiff with a plan of his land included in its said location, nor did the plaintiff request such a plan.

Neither the Easton Branch Railroad Company nor the defendant ever fenced or entered into actual occupation of the demanded land until the year 1879, since which time the defendant has been in actual occupation, against the objection of the plaintiff, who up to that time had no actual knowledge that any of his land was included in said location, nor any notice of that fact except such as was given by the filing of the location as aforesaid. The plaintiff has never parted with his title to the demanded premises except as herein stated, nor did the Easton Branch Railroad Company or the defendant ever pay the plaintiff any damages or compensation for the taking of his land.

If by said location the Easton Branch Railroad Company acquired a right to occupy and use said land for railroad purposes, judgment is to be rendered for the tenant; otherwise, for the defendant.

The court entered judgment for tenant, and demandant appealed.

Oscar A. Marden for demandant.

HOLMES, J. — The location identified the land, and therefore satisfied Rev. Stat. c. 39, § 75. Filing it was sufficient notice of the taking. *Woodbury v. Marblehead Water Co.*, 145 Mass. 509; *Grand Junction R. & D. Co. v. Middlesex County*, 14 Gray, 553, 564. As pointed out by the tenant, it must be presumed that the demandant was notified of the petition for authority to take, as required by Rev. Stat. c. 39, §§ 46–48. The authority and its limits are contained in the charter, Stat. 1854, c. 55, and Acts referred to. It would be impracticable to make the validity of

Not necessary
to state
owner's name.

the taking depend upon notifying all owners personally by name; and in proceedings *in rem* of this sort it is not necessary. In view of the above decisions, we do not think it requisite to do more than cite a few cases from other States which sustain or go beyond our opinion. *Johnson v. Joliet & C. R. Co.*, 23 Ill. 202; *Cupp v. Seneca County*, 19 Ohio St. 173; *Stewart v. Board of Police*, 25 Miss. 479; *Wilson v. Hathaway*, 42 Iowa, 173, 176; *Owners of Ground v. Albany*, 15 Wend. 374; *Georges Creek, C. & I. Co. v. New Central C. Co.*, 40 Md. 425, 438. It should be added that the agreed facts do not warrant the assumption of the demandant in his argument that the names of other owners did appear in the location and plan in such a way as naturally to mislead him into the assumption that no part of his land was included.

The objection that the demandant was not furnished a plan is pretty nearly disposed of by *Abbott v. New York & N. E. R. Co.*, 145 Mass. 450. The fact that the land in controversy belongs to a different person from the owner of the adjoining land actually used by the railroad, whether or not it might be important under other circumstances, is not so in this case. The failure to furnish a plan did not affect the tenant's title (145 Mass. 451), or suspend the running of the time for applying for damages, which has long gone by. Rev. Stat. c. 39, § 58; *Charlestown Branch R. Co. v. Middlesex County*, 7 Met. 78; *Hazen v. Boston & M. R. Co.*, 2 Gray, 574, 580; *Meriam v. Brown*, 128 Mass. 391, 393. The right of the demandant now to require a plan, if it exists, is a naked right of no practical use, and does not entitle him to recover in this action.

Judgment affirmed.

Necessary Requisites of Map to be filed marking Location.— See *People v. Brooklyn, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 454.

Notice to Land-Owner in Proceedings in Eminent Domain.— See generally, Note 1, Am. & Eng. R. R. Cas. 11; *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 10 Ib. 444; *Rheiner v. Union-Depot Street R. Co.*, and note, 14 Ib. 373-378; *Memphis, etc., R. Co. v. Parsons & Co.*, and note, 14 Ib. 379-384; *In re Minneapolis, etc., R. Co.*, 17 Ib. and note, 122-124; *Birge v. Chicago, etc., R. Co.*, and note, 20 Ib. 291-293; *Cummins v. Des Moines, etc., R. Co.*, 17 Ib. 86; *Barlage v. Detroit, etc., R. Co.*, 17 Ib. 931; *New York & N. E. R. Co. v. New York, etc., R. Co.*, 25 Ib. 215.

Sufficiency of Description of Land to be taken.— A petition for condemnation which describes a tract of 106 acres properly, and asks that "a strip of land . . . 200 feet wide, for a distance of 1,151 feet across the tract . . . above described, commencing at the point where the line of said railway is now located and staked out, enters said tract coming from the east, and going towards the west, and 100 feet in width across the balance of said tract, . . . being respectively 50 feet and 100 feet in width on each side of the centre line of said railway, . . ." sufficiently describes the land to be taken. *Suver v. Chicago S. F. & C. R. Co.* (Ill.), 14 N. East. Rep. 12.

In re NIAGARA FALLS & WHIRLPOOL R. Co.

(New York Court of Appeals. Feb. 28, 1888.)

Eminent Domain. — Right to exercise Power. — Public Use. — A railroad which does not connect with a highway; which can only be reached by passing over State or private lands; which can have no habitations along, or any freight traffic over, the road; whose sole business is to convey sight-seers along the Niagara River; and the season of whose operations is confined to four months of the year, — is not such a railroad corporation as is contemplated by the General Railroad Act of 1850, and there is no such public use as to justify the exercise of eminent domain in its behalf.

APPEAL from general term, Supreme Court, Fifth department.

This was an application by the Niagara Falls & Whirlpool Railway Company to acquire certain real estate belonging to the De Vaux College and others, to be used as a right of way. Judgment below was against petitioner, and it appealed.

Norris Morey, for appellant.

A. K. Potter, for respondent.

ANDREWS, J. — There is a question *in limine* which it is necessary to decide in favor of the petitioner before the other questions argued become material. This is the question whether the purposes for which the Niagara Falls & Whirlpool Railway Company is organized are public in such a Facts. sense as to justify the taking of lands *in invitum* for the construction of its road, in the exercise of the power of eminent domain. The Niagara Falls & Whirlpool Railway Company is a corporation, organized in January, 1886, under the general Railroad Act of 1850. The articles of association declare that the company is organized for the purpose of “constructing, maintaining, and operating a railroad for public use in transporting persons and property, of the gauge of not more than three feet and six inches, and not less than thirty inches within the rails.” The route of the road is described as “commencing at a point near the foot of the inclined railway, which extends from Prospect Park to near the easterly margin of Niagara River, such point of beginning being a short distance below the foot of the American Falls, on the American side of the Niagara River in the county of Niagara, and running thence (by the most direct and feasible route) along the easterly margin and near the water’s edge of said Niagara River, and terminating at a point on said easterly margin of said Niagara

River, about four hundred feet below, and northerly, from the foot or outlet of the portion of Niagara River commonly known as the 'Whirlpool.' "

It is necessary to a just understanding of the question presented, to refer to some additional facts disclosed by the evidence. The Niagara River, from the foot of the American Falls, flows northerly for several miles with a very rapid current, and the river on either side is faced by precipitous cliffs; that on the American side rising from near the edge of the river to a height of from a hundred and fifty to two hundred feet, to the table-land above. The river, from the falls to the point known as the "Whirlpool," is interesting, and persons visiting the falls have been enabled, by means of what is known as an "inclined railway," to descend from the top of the bank or table-land to the margin of the river. This railway was originally a private enterprise, but is now included in the land taken by the State for a State reservation. The "Whirlpool" adjoins the lands of De Vaux College. The college has constructed a stairway leading down to the margin of the river at this point for the convenience of visitors, and derives a revenue from its use. The petitioner has located its road along the margin of the river, outside of the cliff, where the space is sufficient between the cliff and the river to permit the track to be laid, and at other points, where the cliff rises with more abruptness from the margin, the location contemplates cutting into the face of the cliff for the roadway. The proposed road does not connect at either end with a highway. It can be reached only by passing over the lands of the State or the lands of private owners. There can be no habitations along the line of the road, and no traffic, or commerce, or business, except in conveying passengers over the road to see the river and the "Whirlpool," and returning them again to the point from which they started. The season for visitors at the falls is substantially confined to June, July, August, and September. The proposed road cannot be operated during the winter on account of the piling-up of the ice, and, if its operation were practicable in the winter season, it would have nothing to do. It is apparent that the proposed enterprise has been undertaken and is to be carried on for the sole purpose of furnishing sight-seers, during about four months of the year, greater facilities than they now enjoy for seeing the part of Niagara River along which the proposed road is to be constructed. Soon after the passage of the general Railroad Act of 1850, the question was raised as to the validity of the Act in so far as it attempted to confer upon any corporation which might thereafter be created under its provisions the power to determine when and what private property might be compulsorily taken for the purposes

of its road, and it was held that the Act was a constitutional delegation of the power of eminent domain. *Railroad Co. v. Brainard*, 9 N.Y. 100. The expediency of this legislation has been questioned. In the infancy of railroad enterprises there was little danger that railroads would be projected, not required by public necessity, or where the public interests would not be subserved by their construction; but the plan of permitting any persons who might deem it for their interest to do so, to unite and organize a railroad corporation, and to fix the route, subject practically to no supervision or control by any public authority, and to invade and take private property for the purposes of the road wherever the company should see fit to locate it, is attended with some unquestionable evils. It is probably true that many speculative railroad enterprises have been initiated and carried on under this liberal legislation, which would not have been authorized if a special charter in each instance had been required, or if the power of determining as to the necessity of the road had been lodged with some disinterested public body. The right of the State to authorize the condemnation of private property for the construction of railroads, and to delegate the power to take proceedings for that purpose to railroad corporations, has become an accepted doctrine of constitutional law, and is not open to debate. But the power is dormant until the Legislature authorizes its exercise; and the particular corporation which claims the right to exercise the power must be able to show a legislative warrant, and, that being shown, it must be able, further, to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes; or that the business which it is organized to carry on is public; and that the taking of private property for the purposes of the corporation is a taking for public use. The general principle is now well settled, that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used, and the extent to which such right shall be delegated, are questions appertaining to the political and legislative branches of the government; while, on the other hand, the question whether the uses are, in fact, public, so as to justify the taking *in invitum* of private property therefor, is a judicial question to be determined by the courts. *Beekman v. Railroad Co.*, 3 Paige, 45; *In re Cemetery Association*, 66 N. Y. 569; *In re Ferry*, 98 N. Y. 139-153.

The General
Railroad Act.
Power of the
Legislature
and the Courts.

If the question whether the purposes and objects for which

the petitioner, the Niagara Falls & Whirlpool Railway Company, is organized, are public, so as to justify the exercise in its behalf of the right of eminent domain, is controlled and is to be tested exclusively by the description of those objects and purposes as they are set forth in its articles of association, there could be

Purposes of
Niagara Falls
Railway not
public.

no hesitation in concluding that the company is entitled to take the proceedings now in question, unless the particular property now sought to be taken is, on special grounds, exempt from condemnation. Looking at the articles of association alone, it appears that the company is a railroad corporation, organized under the general Railroad Act for "public use in transporting persons and property" by a railroad to be constructed between certain *termini*. The papers, on their face, show that the corporation has undertaken an ordinary railroad enterprise within the purview of the act of 1850, in aid of which the power of eminent domain may be appropriately exercised. But when we look beyond the formal documents, and the actual business proposed to be conducted is considered, we find that the proposed railroad has no proper *termini*; that it is not a highway in any just or proper sense; that it cannot, by reason of necessary limitations, perform one part of the duty it has undertaken, viz., the transportation of freight; that, at most, it can be operated but a portion of the year; and that the sole object of its construction is to enable the corporation, for a compensation to be received, to provide for the portion of the public who may visit Niagara Falls better opportunities for seeing the natural attractions of the locality. We feel constrained to say, that, in our judgment, this is not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise. The right of the company being challenged on this ground, the court is compelled to consider it, and it is manifest that the inquiry is not precluded because the petitioner has organized itself under the general Railroad Act, and has assumed in its articles of association the character of an ordinary railroad corporation. What is a public use, is incapable of exact definition. The expressions "public interest" and "public use" are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. The ground upon which private property may be taken for railroad uses, without the consent of the owner, is, primarily, that railroads are highways furnishing means of communication between different points, promoting traffic and

commerce, facilitating exchanges ; in a word, they are improved ways. In every form of government, the duty of providing public ways is acknowledged to be a public duty. In this State the duty of laying out and maintaining highways has, in the main, been performed directly by the State or by local authorities ; but from an early day, the Legislature has, from time to time, delegated to turnpike corporations the right and duty to maintain public roads in localities, and canal companies have been organized with powers of eminent domain. It would be impracticable, and contrary to our usages, for the State to enter upon the business of constructing and operating railroads ; and, in analogy to the delegation of the power of eminent domain to turnpike and canal companies, it wisely delegates to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers, and, as incident thereto, the right to take private property under the power of eminent domain on making compensation. In considering the question, what is a public use for which private property may be taken *in invitum*, Judge Cooley (Const. Lim. 669) remarks : "That can only be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to these matters of public necessity, which, on account of their peculiar character, and the difficulty — perhaps impossibility — of making provision for them otherwise, it is alike proper, useful, and needful for the public to provide." Whatever rule, founded on the adjudged cases, may be formulated on this subject, it cannot, we think, be framed so as to include the present case. The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one, so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an act of the Legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or comfort of those who may visit the falls. The State has, under recent legislation, taken lands for a park or public place at Niagara Falls. The taking of lands by municipalities for public parks, is recognized as a taking for public use. *Commissioners v. Armstrong*, 45 N. Y. 234 ; *In re Mayor*, etc., 99 N. Y. 569. They contribute to the health and enjoyment of the people, and are laid out with drives and ways for public use. *Nahant Road*, 11 Allen, 530, and *Mount Washington Road*, 35 N. H. 134, were justified on the ground that they were public

highways in the ordinary sense, although primarily intended as pleasure drives. It is, as we have said, difficult to make an exact definition of a public use. It is easier to define by negation than by affirmation. We are conscious of the serious responsibility which the court assumes in undertaking to declare that not to be a public use which the Legislature has declared to be such. The validity of an Act of the Legislature is not to be assailed for light reason. It is especially necessary that the question of what constitutes a public use should not be dealt with in a critical or illiberal spirit, or made to depend upon a close construction adverse to the public; but, having these considerations in mind, we are nevertheless constrained to conclude that the enterprise in question is essentially private and not public, and that private property cannot be taken against the will of the owners for the construction of the road of the petitioner.

The order appealed from should therefore be affirmed.

All concur.

Nature of the Use for which Right of Eminent Domain may be exercised. — **Right to question.** — In *Denver R., etc., Co. v. Union Pacific R. Co.*, 34 Fed. Rep. 386 (decided March 26, 1888), it was held that the Constitution of Colorado, art. 15, § 4, declaring all railroads to be public highways, does not prevent the raising of the question as to the character of a railroad in a proceeding by it to condemn land; art. 2, § 15 providing that, "whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

Judge Hallett said, "The third answer is, that 'the defendant, further answering, respectfully shows to the court, and alleges, that the said company was organized, and is a private corporation, for the purpose of constructing and operating a railroad from certain coal lands owned, as alleged by the petition, to Denver, and for the purpose of hauling its coal from said lands to the city of Denver, as private enterprise, and not for the accommodation of the public in any way or manner whatever.' This answer appears to be intended to present the question that the road built by the petitioner is a private road, and not for public use. It is, however, rather indistinctly stated. The averment is, that the company was organized for this purpose, and as a private corporation, without a distinct statement as to what the road will be if built. The inquiry is not as to what the company was organized for, or whether it will be a private or public corporation, but what the road will be, the structure itself, if any such thing will be made. I regard it as a serious defect in the answer, and don't think it can be a question of fact to be tried, whether this company is organized in one way or another, except it may be to inquire whether it conforms to the statute regulating such matters; but it may be a question of inquiry to be determined as matter of fact, whether the road, when built, will be a public or private road; and the question will be the same, whether the road shall be built by a corporation or by an individual. That question does not in any way appertain to the other, by whom the road is built. It is a question what the road itself is, not as to the character, or the quality of the builder. But, taking the answer to be a statement that the road will be private, and not public, and is intended so to be, petitioner denies that any such answer can be made or received in an action of this kind; and

he founds his argument upon provisions of the Constitution of the State. In sect. 15, art. 2, Const., some provision is made as to taking private property for public use; and the last clause of that section is: 'Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.'

"Counsel for petitioner concedes that by this clause an inquiry may be made as to whether the road which it is proposed to build is of a public or private character; and that he cannot very well deny, because this is not a new principle in the law. It is affirming only what stood before in the law, probably that there might be no misunderstanding in respect to it. Mr. Mills, in sect. 10 of his work on 'Eminent Domain,' referring only to the general principle which stands in the law, without support from any constitution, says, 'The Legislature cannot so determine that the use is public as to make the determination conclusive upon the courts. The attempt of the Legislature to determine the public character of the use does not settle that it has the right to do so; but the existence of the public use in any class of cases is a question to be determined by the courts. The presumption is in favor of the public character of a use declared to be public by the Legislature; and unless it is seen at the first blush that it is not possible for the use to be public, the courts cannot interfere. The grant of the right of eminent domain is a determination on the part of the Legislature that the objects for which it is granted are necessary. There can be no way for courts to be possessed of all the facts and circumstances which the Legislative department had before in each particular case. An abuse of a general Act authorizing condemnation for private purposes will not be tolerated,' etc.

"It may be that this provision of the Constitution was inserted with a view to remove the presumption which is here referred to, or perhaps to allay all doubts which might arise at any time in respect to the question; but it is certainly true that this provision of the Constitution is only a declaration of the law as it stood at the time the Constitution was made. But petitioner's counsel contends that this is controlled by, and in effect nullified by, sect. 4, art. 15, of the same Constitution, which declares that 'all railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this State, and to connect at the State line with railroads of other States and Territories. Every railroad company shall have the right, with its road, to intersect, connect with, or cross, any other railroad.' The argument of counsel is that, as, by this clause of the Constitution, a railroad is made a public highway, no question shall be raised as to its character in any proceeding; but it shall always be taken to be, and accepted, as a public highway in all proceedings whatsoever. That appears to be reasoning in a circle. To say in one clause, that, whether it shall be taken to be of a public character is for the courts to determine, and then find in another clause that the constitutional convention has determined it itself, is going round and round in the same course. I cannot accept any such position or proposition as that, — in fact, I regard it as exceedingly technical and far-fetched, — and it is certain that, in all proceedings in courts where these proceedings have been recognized elsewhere, no such position has been taken, nor has it been thought necessary to discuss it.

"Here is a case from a State in which the rights of corporations in condemnation proceedings certainly have not been ignored, which seems to go as far as the counsel for defendant asks the court to go in this instance. This case is *Railroad Co. v. Wiltse*, 116 Ill. 449; s. c., 24 Am. & Eng. R. R. Cas. 261. A question arose in the case as to the character of the use upon

the evidence, no answer being received in that State as to any of these matters; but upon the hearing, evidence was received to show that the track which petitioners sought to build was only for the purpose of connecting its main line with some brickyards, which were not very far from the line of the road. Concerning the power of the court to make such an inquiry, the court says, 'The questions, however, of whether the use to which it is sought to appropriate the property is a public use or purpose, and whether such use or purpose will justify the exercise of the compulsory taking of private property under the statute and Constitution, and, where the power is attempted to be exercised by an incorporation, whether the power is delegated to the corporation by the Legislature, and whether the uses and purposes for which such power is sought to be exercised fall within the legislative grant of powers, are proper subjects of judicial determination.' For which a large number of authorities are cited.

"It is evident from the evidence in this case that the sole use and purpose of the proposed track was to reach the brick-works situated between a half and three-quarters of a mile from appellant railroad, and thereby create a feeder to its main line, and add to the value of its freights. There was no pretence that there was any necessity for any increased facilities in the locality of the proposed track, except for the purpose of saving the hauling of brick from these brick-works, and the increased traffic brought to appellant's main line by the building of this spur.'

"Further on, 'It is conceded, substantially (and the evidence abundantly shows the fact), that this proposed track in no way increases or adds to the facilities for transacting the business of the railroad appellant is authorized by its charter to build and operate, but, on the contrary, by adding to the volume of its freights, would tend rather to embarrass the main line of road than otherwise.'

"This discussion is quite lengthy, and it is full to the point that, whether the road is to be public use or a private road, is fully open to inquiry and decision in all cases of this kind, and other authorities are not wanting. A year ago, or nearly so, in the case of *McPhee* and another against the Union Pacific Railway Company (an equity case in this court), the same rule was followed; and upon the charges in the bill in that case, it was *held* that a track which the Union Pacific Company was proposing to lay down in some parts of this town was only a private road for serving certain warehouses, not of a public character, which would enable them to proceed in opposition to the demands of property-holders in the neighborhood. If this answer were directed to the quality of the road which the petitioner proposes to build, rather than the purposes of petitioner's organization, it would be sound. As it stands, it is not a good answer, and must be struck out." And see, generally, *Baltimore & O. R. Co. v. P. W. & K. R. Co.*, 10 Am. & Eng. R. R. Cas. 444; note, 1 Ib. 41; *Getz's Appeal*, and note, 3 Ib. 186-195; *Case v. Kelly*, and note, 14 Ib. 70-73; *Tracy v. Elizabethtown*, and note, 14 Ib. 407-413.

Sufficiency of Statement of Purpose for which Property is to be taken.—A petition by which a railroad company seeks to condemn certain lands described, averred that "a part of each of said lands is necessary to petitioner for its right of way, side-tracks, depot and depot grounds, freight-yards, shops, and appurtenances, for the construction and operation of its said line of railroad." *Held*, that this was a sufficient statement of the purposes for which the property is sought to be taken.

Neither was it necessary for the petitioner to set out the plans and specifications for the road; but the defendants could call for such specifications, and the failure to set them out, if a cause of complaint, should be taken advantage of by demurrer. *Suver v. Chicago, S. F. & C. R. Co.* (Ill.), 14 N. East. Rep. 12.

BESEMAN

v.

PENNSYLVANIA R. Co.

(New Jersey Supreme Court, March 19, 1888.)

Incidental Damages caused by the Operation of a Railroad. — A railroad company is not responsible for the incidental damages occasioned to land abutting on or near to the track, the road being run, in all respects, with care and skill.

ACTION to recover damages alleged to have resulted to plaintiff's property by the running of defendant's trains. On demurrer to the second plea. Demurrer overruled.

Argued before Beasley, Ch. J.; Scudder, Reed, and Dixon, JJ.

This suit is for damages alleged to have been done to the houses and lands of the plaintiff, by the running of the defendant's trains.

The declaration, in substance, alleged that the plaintiff was the owner of certain lots of land in Jersey City, fronting on Fifth Street, on each of which lots there were dwelling-houses on the front and rear, and that the defendant on the 1st of January, 1874, built an elevated track for a railroad, running at the rear of said lots and very near, to wit, within ten feet of the dwelling-houses situated on the rear part of said lots, and during, etc., has used said elevated track for the passage of locomotives and cars in the transportation of cattle, sheep, swine, manure, and other freight, as to render said dwelling-houses of said plaintiff unfit for habitation, and of no use or value to said plaintiff whatever, and that said defendant, during all the time aforesaid, both in the daytime and at all hours of the night-time, has wrongfully allowed its cars loaded with cattle, sheep, swine, manure, and other freight, emitting noisome and unhealthy odors, to stand upon said track within close proximity, to wit, the distance of ten feet, to the dwelling-houses on the rear of said lots, and has then and there shifted and distributed its cars, and blown the whistle of its locomotives, and started its trains of cars, and suddenly stopped them and backed them and started them again, causing great and unusual noises in the neighborhood of said dwelling-houses, and causing divers noxious, offensive, and unwholesome vapors, fumes, smokes, smells, and stench to

flow, arise, and surround said dwelling-houses, and thereby also jarring the doors and walls of said dwellings and breaking the plaster upon the walls, and by means aforesaid have driven the tenants from said houses, and have rendered the same untenable and unfit for use, etc.

The first plea was the general issue on which issue was found.

The second plea, which was demurred to, was a special traverse.

In this the defendant set out its chartered right to build this elevated railroad, and then averred "That in execution of said powers and by force and virtue of said Acts, it did survey, lay out, and locate said railroad on the several courses set down in said survey, and did construct a railroad between the points in the said last above Act set forth, as it fully might do, doing no unnecessary damage to private or other property," etc.

That after the construction of said railroad at the several times when, etc., the defendant, in order to carry into effect the objects of the incorporation of the said The United New Jersey & Canal Company, did use the same in the prosecution of its business as a common carrier of passengers and freight, and continued the same during the time mentioned in said declaration, as it lawfully might do for the causes aforesaid, and did thereby necessarily create some smell and some noise, and did necessarily shift and distribute its cars, and did necessarily blow the whistle of its locomotives, and did necessarily start and suddenly stop with trains of cars, and back them and start them again, and did necessarily cause noises, smoke, and vibration, and did necessarily transport thereon cattle, sheep, swine, manure, and other freight, as it lawfully might do for the causes aforesaid, which are the supposed grievances of which the plaintiff in her said declaration complains, without this, that it, the said defendant, was guilty of the said supposed grievances or any or either of them, and this, it, the said defendant, is ready to verify.

William H. Davis and John Linn for plaintiff.

BEASLEY, CH. J. — The form of the plea, which has been demurred to, will be considered briefly in the sequel; but for the present it will be taken to present, in a sufficient manner, the facts on which the defendant in this part of the procedure has based its defence. That defence, stripped of all verbosity, is, that by force of its franchises derived from the public grant, it has built its road and run its trains, carrying merchandise and freight, near to the lands of the plaintiff, doing the plaintiff no more damage than that which necessarily resulted from the transaction of such acts

Grounds of the
complaint and
the defence.

and business. Its position is, that for such incidental and unavoidable damage it is not responsible. The plaintiff occupies the opposite ground, claiming that with respect to private property, a railroad is *per se* a nuisance whenever it throws a detriment, such as would be actionable at common law, on such property.

That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damnified by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damnified at all — unless, indeed, the loss sustained be so small as to be unnoticeable by force of the maxim *De minimis non curat lex*. The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing, in a sensible degree, some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and, consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching such land-owners, general *tort feasers*; their tracks run for miles through the cities of the State, and every land-owner on each side of the track would be entitled to his action, and so in the less populated districts each proprietor of lands adjacent to the road would have a similar right; and thus the litigants would be numbered by thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility.

The question a momentous one. Consequences of complainant's theory.

Nor is this susceptibility to be sued on all sides the only, or even the worst, consequence of the theory in question. For, if these rights of action exist, it follows necessarily, that each of the persons in whom they are vested can prevent the continuance of the wrong out of which such rights of action arise. If this plaintiff should recover two or three verdicts against the defendant because of the damage that is inseparable from the running of its trains, there is plainly no ground on which the chancellor could refuse to enjoin a continuance of the nuisance. Nor does there appear to be any relief from such a consequence; the aggrieved land-owner would be the master of the situation; for there is no law by force of which the company

could take his land, *in invitum*, or compel him to have his damages assessed once for all. In short, the plaintiff's claim involves the assertion that he can put a stop to the business of the defendant at the point in question.

The statement of the legal situation, if the hypothesis in question obtained, shows that such hypothesis is a mere vagary.

**Railroads not
responsible for
incidental
damages.**

From the first institution of railroads in this State to the present time, these grounds of action, if they exist, have been present in numberless instances, and yet this is the first suit of the kind that has been brought. The statutes of the State have always been, and are now, framed on the opposite theory. These laws, in providing for the acquisition and condemnation of lands, authorize the taking of such lands only as are requisite for the necessary structures of the road and the accommodation of its business, and require the payment of damages only to that class of land-owners. These corporations are not permitted to sequester any other property, nor to compensate for other damages. The central idea of the system is that for incidental damages these companies are not responsible. This system, thus ancient and uniform, is now challenged in this case.

The process of reasoning which is used in support of the plaintiff's claim has not been overlooked. It is said that the

**Plaintiff's
process of
reasoning
considered.**

plaintiff's property has been damnified, and that, as the law declares that whenever there is a wrong there is a remedy, the Legislature itself cannot deprive him of his right to redress. But this course of argument contains in it the fallacy that the general rules of law are universal, like rules of logic. But law is a practical science; and almost all its general principles, however wide their application may seem to be, have, on all sides, their reasonable limitations.

Ingenuity is ever apt to run them to extremes, and it was this too subtle (*nimis callida*) interpretation of legal rules that led Cicero to the declaration, "*Summum jus, summa injuria.*" Therefore, if the maxim asserting the universality of the redress provided by the law for wrongs would by its terms extend to the damage sustained by the plaintiff, in its practical application it would be kept within expedient bounds. But in truth, to take this maxim as a rule in the present case is to assume its fundamental term, that is, to presuppose that a wrong was committed by the mere act of running these trains. This is the very point in controversy; for the defence is that the Legislature could dispense the company from responsibility for such damage, and that it has done so.

This latter contention must, I think, be sustained. The legis-

lative power is amply competent for such a purpose, and it is obvious that it has put forth such power. It is a radical error to regard these corporations as simply private. They have a public as well as a private aspect, and it is on this account that the immunity in question belongs to them. That they possess, in some degree, the nature of a public corporation, can not and will not be denied, for they could not otherwise acquire a foot of land for their roadway in this State by condemnation. The Constitution prohibits the taking of private property for any other than a public purpose; so that the concession that a railroad company can compel the surrender of the land necessary for its purpose, is an admission that such purpose is a public one, and the running of trains is as much a part of such purpose as the laying of the roadbed is. It would seem quite irrational to say that the making of the track is an act done so far in behalf of the community that the eminent domain of the State may be resorted to for its furtherance, but that the running of trains upon such track is a purely private affair, in which the people at large have no interest. These roads, in view of their effect upon social and commercial interests, are of vastly more importance than are most of the public highways; and it is on account of this transcendent usefulness that they, to a large extent, have been and must be regarded as public agencies.

Legislature
has dispensed
company from
responsibility
for damages.

Looking at them in this light, it is but following the ordinary path to declare that they are not responsible for those incidental damages that result from the proper exercise of their functions. This is the settled rule. The Legislature may authorize the altering the grade of a city street; such act may occasion immense loss to the owners of the abutting property; and such loss is *damnum absque injuria* — the reason being that the improvement is a matter of public concern, and that each individual member of the community, while he is entitled to its benefits, must submit to its burdens. The attitude of railroad companies, so far as relates to the applicability of legal principles, is not dissimilar: they run their trains by legislative authority for the public benefit, and on that account, in doing such acts, they are so far forth the representatives of the body of the people. The defendant alleges that it has kept entirely within the limits of its chartered rights in running its trains, and that the plaintiff has suffered no damage except such as is necessarily incident to such transactions; and it seems to me that if this be true this action cannot be maintained.

In support of the contrary view the counsel of the plaintiff relies on two cases; viz., *Pa. R. Co. v. Angel*, 14 Stew. Eq. 326; and *Balt. & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 328.

Authorities
reviewed.

Neither of these decisions is in point; and the principles of law declared in the latter is directly adverse to the proposition laid as the basis of this suit. The former of these precedents presented to the court the naked proposition whether the railroad company, the defendant in the proceeding, should be restrained from doing certain acts which were obviously *ultra vires*. The court found as a fact that the defendant was doing continuously, to the detriment of the complainant, that which was entirely unauthorized by its charter; and the case did not call for any expression of opinion on the part of the tribunal as to the effect of incidental damage done by the road in the necessary operations of its business. The case has no value as a precedent beyond this.

The decision of the Supreme Court of the United States just referred to rested on the same basis. On it a railroad company had located its repair-shop and engine-house next to a church, to which it was a nuisance by reason of the noises occasioned by the business carried on at the place. The court declared that the company could not justify the maintenance of such a nuisance. The propriety of this result seems unquestionable. The railroad company, in selecting a place for repair-shops, acted altogether in its private capacity; such location was a matter of indifference to the public; and consequently, with respect to such an act, the corporation stood on the footing of an individual, and was entitled to no superior immunities. But in this same case, Mr. Justice Field, in his opinion, is careful to emphasize the difference, in legal results, between those damages which are the necessary product of the running of a railroad, and those which are not of that character, for he says, "Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress; and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

It is apparent that the inconveniences and annoyances here mentioned were such results from the running of the cars in the public streets as would have been deemed actionable wrongs, but from the public character of the business of which they were the necessary incidents. It is stated to be damage (*damnum*); but it is *absque injuria*, because the cause producing it is legalized in promotion of the general welfare.

The decisions appear mainly to agree with respect to this doctrine. They are quite numerous, and the few following are cited merely as examples. *Radcliffe v. Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Chapman v. Albany & S. R. Co.*, 10 Barb. 369; *Grand Rapids & Ind. R. Co. v. Heisel*, 33 Mich. 62; *Struthers v. Dunkirk, etc., R. Co.*, 87 Pa. 282; *Cosby v. Owenboro & R. R. Co.*, 10 Bush (Ky.), 288; *Pa. R. Co. v. Lippincott*, 30 Am. & Eng. R. R. Cas. 399.

Nor does it seem that this principle is, on the whole, unjust in its operation. It is, in all probability, no more reasonable to say that the property in the vicinity of a railroad will be greatly reduced in value by the running of its cars, than that the introduction of stores into a city street, before exclusively devoted to dwelling-houses, impairs the value of the property devoted to such use; the fact being, that while each of such lots becomes depreciated for one particular use, its general value is much enhanced. And such is the effect of railroads on contiguous property, for while such land may be said to be injured on one side, it is benefited on another; and there is no great hardship in requiring the land-owner to submit to a loss for which he receives a compensation.

The principle
not unjust in
its operation.

There is but a single case in this State in which the present question has been placed directly *sub judice*. In the *Morris & Essex Railroad Company v. Newark*, 2 Stock. 352, the owners of the land abutting on the street along which the railroad company had laid a track, complained that their property was incidentally injured by the running of the trains, but this was treated as *damnum absque injuria*, this being the language of the chancellor; viz., "It follows further, admitting the correctness of the views expressed, that the adjacent land-owner cannot maintain an action at law for consequential damages, unless he can show a negligent exercise by the company of their legal rights; because no action at law will lie for a consequential injury necessarily resulting from the exercise of a legal right under legislative authority." And some of the New York decisions already cited were referred to in corroboration of the view thus declared.

The New
Jersey case
considered.

. And this, for at least the third of a century, has been the practical construction given by the courts of this State to the charters of these corporations. It has been the invariable course, so far as is known, for juries to be instructed that these companies are not responsible for the results of the running of their trains, provided due care and skill be observed in the business.

The doctrine
of that case
always
followed.

It has been of frequent occurrence that valuable tracts of woodland have been fired from the locomotives drawing trains; and

on such occasions the judicial instruction has uniformly been that the damages so occasioned could not be made the ground of suit, unless the spark arresters were out of order, or were not of approved pattern, or negligence of some kind had been exhibited. And it is not remembered that such doctrine has been called in question, even to the extent of being challenged in the argument of counsel.

And it was upon this principle that the cases of *Hoff v. West Jersey R. Co.*, 16 Vroom, 201; and *Salmon v. Del., etc., R. Co.*, 10 Vroom, 299, 9 Vroom, 5, were severally decided.

In England the same doctrine has prevailed. The distinction between the damage done by sparks escaping from a locomotive run by a company unauthorized by charter, and when such results proceed similarly from an engine run under a legislative sanction, is sharply drawn in the case of *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733; it being held that, while a liability to suit arose in the former case, in the latter it did not.

It may be further remarked, that this principle had become so prevalent and deeply rooted in the jurisprudence of this country that it has required express legislation in some of the States to eradicate and supersede it. *Grissell v. Housatonic R. Co.*, 26 Law. Reg. 260; *Lyman v. Boston, etc., R. Corp.*, 4 Cush. 288; and it is not unimportant to note, that when that legislation was being tested before the courts the contest was with respect to its constitutionality, which was assailed on the ground that the Legislature could not deprive these corporations of that irresponsibility for consequential damages that had been impliedly given to them in their charters. In the judicial opinions relating to such controversies, it is taken as an admitted *datum* that the corporate bodies were originally possessed of the immunity claimed, but that it was competent for law-makers to deprive them of it.

Nor have I found any serious constitutional difficulty with respect to this question. It has not been unobserved, that it is said that, as the Legislature cannot authorize, by force of the Constitution of the State, property to be taken for public use, without compensation, it follows that it cannot legalize an injury to such property. The argument is, that to injure property for the public benefit, to the extent, say, of one-half of its value, is, in substance, to take for that purpose a moiety of it.

But this line of reasoning excludes altogether, as it appears to me, the legislative control over the subject. As already remarked, if the right of action cannot be taken from the land-

owner when the injury to his property is equal to one-half of its value, neither can this be done when it is damaged to one-twentieth part of its value, or in any other actionable degree. To hold otherwise would be not only illogical, but also impracticable; for who would be able to say to what degree the damage must go in order to give the right of action? In my opinion the legislative power covers the entire field of incidental injuries.

In the case cited from the English reports, it was held that the burning of a haystack by the engine of an unchartered company was a loss that could be redressed by action, without respect to the question whether the fire had been kept with proper care or not; and yet the court declared, as has always been judicially declared in this State, that if such engine had been used under legislative authority, such loss would have been remediless. This, it is evident, was maintaining a legislative right to deprive a person of a right of action due to him at common law for an injury resulting in the entire destruction of his property; and this is the legal principle that has practically been enforced in this State from the time of the existence of its first railroad up to the present hour. And it is this entire doctrine that must be abrogated if we say that, by force of the Constitution, the Legislature cannot exempt these companies from responsibility for those things that are the necessary concomitants of the use of the road.

When property has been incidentally injured, no matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless; and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use. All the public improvements in the State have been built, and are now resting, on this foundation. For my part, therefore, I find no embarrassment in disposing of the present subject, for I have put railroads in the category of public agents, and have regarded them as possessed of all the immunities, in the particular in question, belonging to such an office; for, to me, it does not appear to be consistent with reason to declare that these exemptions may be legislatively bestowed upon an inconsiderable turnpike company, but cannot be given in favor of these great highways connecting distant countries and extending over a continent. It remains to say but a word about the form of the plea. It seems to me unobjectionable. Its inducement contains the facts essential to the defence arising out of the principles just declared. It sets out the franchise to run the road, and alleges care and skill, and that no unnecessary damage was done. If any avoidable damage was done, the proper course is for the plaintiff to

tender an issue upon that matter in his replication. This is the usual course.

I think the demurrer should be overruled.

Dixon, J., dissented.

See next case and note.

PENNSYLVANIA R. Co.

v.

MARCHANT.

(*Pennsylvania Supreme Court, April 9, 1888.*)

Eminent Domain. — Liability of Railroad for Consequential Damages. — The provision of the Pennsylvania Constitution (Const. 1874, art. 16, sect. 8), that "municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or management of their works, highways, or improvements, which compensation shall be paid or secured before such taking injury or destruction," applies only to such injuries as are capable of being ascertained at the time the work was being constructed or enlarged; and for injuries subsequently received from the operation of the railroad, without negligence or lack of skill, the company is not liable, any more than a private person would be for injuries arising, without his fault, from the lawful use of his own property.

JULY term, 1887, before Gordon, C. J.; Paxson, Sterrett, Green, Clark, and Williams, Justices.

Error to Common Pleas No. 3 of Philadelphia County, to review a judgment on a verdict for the plaintiff in an action of trespass on the case. Reversed.

This was an action by Edward D. Marchant against the Pennsylvania Railroad Company, to recover for consequential damages to his property, No. 1711 Filbert Street, Philadelphia, arising from the building and operation of the Filbert Street extension of the Pennsylvania Railroad to Broad Street Station.

The plaintiff's property was situated on the north side of Filbert Street, and was separated from the railroad by the whole width of the street, which is fifty-one feet wide. The railroad is built on substantial brick foundations on the defendant's own property. The plaintiff in his narrative alleged injury to himself in the possession, use, and enjoyment of his property by reason of the noise, cinders, smoke, and dust incident to the operation and use of the railroad.

The defendant pleaded the general issue and certain special

pleas. At the trial, the testimony showed that the vibration cracked the walls of the house, and the noise disturbed the sleep of the occupants of the house.

A number of points were submitted by the defendant for the ruling of the court, as follows : —

1. The defendant, under its charter and supplements in evidence, had full lawful authority to erect and operate the Filbert Street extension or branch described in the declaration, without incurring any liability by reason thereof for consequential damages to the property of the plaintiff ; the uncontradicted evidence being, that none of the said property was taken by the defendant, but that the entire width of Filbert Street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff.

Ans. Refused. [1]

2. The defendant as purchaser of the main line of the public works of this State, under the Act of Assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert Street extension or branch, without incurring any liability to the plaintiff for alleged consequential damages to his property ; the uncontradicted evidence being, that none of the said property was taken by the defendant, but that the entire width of Filbert Street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff.

Ans. Refused. [2]

3. The contracts contained in the charter of the defendant and the supplements thereto in evidence, as well as the contract contained in the Act of Assembly and deed for the main line, already mentioned, authorized the defendant to construct said extension or branch, with liability for property taken only ; and no subsequent legislation by this State can impair the obligations of those contracts, or either of them, by increasing the price of the exercise of the franchises granted by imposing an obligation to pay for property alleged to be injured, but not alleged to have been taken.

Ans. Refused. [3]

4. The property of the plaintiff being separated from the railroad of the defendant by the entire width of Filbert Street, a public highway of the city of Philadelphia of the width of fifty-one feet, there is no liability on the part of the defendant for alleged consequential damages to said property.

Ans. Refused. [4]

5. The uncontradicted evidence being, that the property of the plaintiff is situated on the north side of Filbert Street, a public highway of the city of Philadelphia, on the opposite side from the railroad of the defendant, which does not occupy any part of

said street opposite the property of the plaintiff, and is erected wholly on its own property, being a distance of fifty-one feet therefrom, and there being no evidence that any of the property of the plaintiff was taken, injured, or destroyed by the construction of the said Filbert Street extension or branch, the verdict must be for the defendant.

Ans. Refused. [5]

6. The plaintiff's property being situated in a thickly built portion of the city of Philadelphia, and upon the opposite side of a frequented public highway, the defendant is not responsible for the consequences to the plaintiff's property of the proper and careful operation of its road.

Ans. Refused. [6]

7. Under all the evidence the verdict should be for the defendant.

Ans. Refused. [7]

Verdict and judgment were for the plaintiff, for \$4,980.

The assignments of error specified: 1-7, the refusal of the defendant's points.

A. H. Wintersteen, James A. Logan, and Wayne MacVeagh for plaintiff in error.

M. Hampton Todd and George H. VanZandt for defendant in error.

PAXSON, J. — This case is admittedly upon all fours with Pennsylvania Railroad Company v. Lippincott, argued and decided at the last term of the court in the Eastern District.

Reasons for reconsidering the Lippincott case.

116 Pa. 472; s. c., 30 Am. & Eng. R. R. Cas. 399. If that decision is to stand, the present case will have to be reversed, as they are in direct conflict. It is only just to the learned judge below to say, that, when this case was tried, the decision in Railroad Company v. Lippincott had not been made, nor had the case been decided, nor had it been argued here. Two of our number dissented in that case, and two of those who heard the present case did not hear the former. I was abroad at the time, and our brother Williams was not then a member of the court.

In view of these facts, and of the grave character of the question involved, we have listened to an elaborate argument involving the same question, and have carefully reconsidered it. It has not had the effect, however, of producing any change in the views of the majority of the court. We adhere to the ruling in Railroad Company v. Lippincott, as announced by our brother Gordon. The ground was so fully covered by his opinion that this judgment might well be reversed without a further discussion of the principles involved. I concur fully in the views

already expressed, and can hardly hope to throw additional light upon the matter, or to strengthen the argument already made. In view of the fact, however, that we listened to what was practically a re-argument, I will add a few words by way of supplement to the previous opinion of our brother Gordon, even at the risk of some repetition.

The plaintiff below is the owner of property on the north side of Filbert Street, and brought his action to recover damages for an alleged injury to said property caused by the operation of the defendant's elevated road. The latter is constructed upon land owned by the company, and the entire width of Filbert Street intervenes between the railroad and plaintiff's house. He complains of the noise, the dust, smoke, and cinders, and the constant jar caused by the passing trains. He says that these causes combined interfere with the enjoyment of his property, and lessen its market value. For the purposes of this cause, we must consider his allegations established by the verdict of the jury.

Facts.

The plaintiff claims to recover by virtue of the Constitution of 1874, sect. 8, art. xvi., which provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

It was held in *Railroad Company v. Lippincott*, that the effect of this clause of the Constitution was to place corporations upon the same plane with individuals as regards liability for injuries to property; and that it only made a corporation liable where an individual was liable at common law. The correctness of this ruling was conceded by the learned counsel for the plaintiff. He says at p. 13 of his printed brief, "We ask for no other or greater liability to be imposed upon this railroad company than would be imposed upon an individual in like circumstances." As, however, other counsel in other cases may not concede so much, I will add a few words to this branch of the case.

Constitution places corporations upon same footing as individuals.

If we resort to the familiar rule of interpreting statutes, the old law, the mischief and the remedy, we have no difficulty in arriving at the true construction of the language cited from the Constitution. Prior to 1874 the citizen whose property was injured by a corporation in the construction of its works had no remedy therefor, unless some portion of his property was actually taken. This was an immunity enjoyed by corporations, and not by individuals.

The mischief under the old law, and the remedy.

Cases of great hardship soon arose. *O'Connor v. Pittsburgh*, 18 Pa. 187, was one of these. In that case the city, by the change of the grade of a street, practically ruined a valuable church property. Yet there was no remedy. This court, of its own motion, ordered a re-argument of that case, "in order to discover if possible," in the almost pathetic language of Chief Justice Gibson, "some way to relieve the plaintiff, consistently with law; but, I grieve to say, we have discovered none."

Instances of a like nature might be cited indefinitely. I have selected this one as an illustration of the principle, and as perhaps one of the most striking. In all of them, however, there was an injury to the property of the plaintiff in consequence of the erection or construction of the works of the corporation, as by the change of grade in *O'Connor v. Pittsburgh*, and the interference with water rights, as in *Monongahela Navigation Company v. Coons*, 6 Watts & S. 101. In all these cases the property had been seriously injured, and yet no portion of it taken by the offending corporation.

This was the mischief which the constitutional convention had before it when sect. 8 of art. xvi. was adopted by that body; and it was the evil the people were smarting under when they ratified the work of the convention at the polls. The Constitution, since 1790, had declared that the property of the citizen should not be taken or applied to public use without just compensation. The Constitution of 1874 went farther, and declared not only that it shall not be taken, but also that it shall not be injured or destroyed by corporations in the construction or enlargement of their works, without making compensation, etc. There is no ambiguity in this language. We have applied it several times to cases arising under it without the least difficulty. We are now asked to apply it, not to injuries to the plaintiff's property arising from the construction of the defendant's road, but to injuries resulting from the lawful operation of its road without negligence.

Before I proceed to discuss this branch of the case, in order that we may know exactly where we stand, I will refer briefly to the cases we have decided under this clause of the Constitution of 1874.

Cases decided
under the
Constitution
of 1874.

Reading v. Althouse, 93 Pa. 400, was a case where certain springs or streams of water had been diverted from their usual course to supply the city with water. By the Act of April 14, 1853, applying to the Reading Water Company, it was provided, that, where the corporation permanently appropriated to its use such springs or streams as it might select for water purposes, compensation should be made to the owners for damages sustained. In an action against the

city by a riparian owner whose stream had been diverted, we held, not only that the action could be sustained under the above Act of 1853, but also that it could be maintained under sect. 8 of art. xvi. of the Constitution. In referring to this section it was said by Mr. Justice Gordon, "That section provides for the making of compensation, not only for the taking of private property for public use, as was the case theretofore, but also for its injury or destruction. That the use which the plaintiff made of the waters of the Great or Antietam Creek, through the race or ditch in controversy, was property, although of an incorporeal kind, is not open to debate, and that it was injured by the operations of the City of Reading, is a fact established by the proper tribunal. There is, therefore, no good reason, apparent to us, why the case should not be covered by the above-recited eighth section of the Constitution."

In *New Brighton v. United Presbyterian Church*, 96 Pa. 331, we had a case before us like *O'Connor v. Pittsburgh*, and differing only in degree. The borough had changed the grade of a street from two feet and a half in some places to fifteen feet in others, and we held that a property owner injured thereby had a right to damages for said injury under the Constitution of 1874, although no such right existed before.

Philadelphia & Reading Railroad Company v. Patent, 2 Cent. Rep. 554, was a case in which the said company, as the lessee of another railroad company, changed the alignment of the tracks of said leased railroad in a certain street in the borough of Manayunk, thereby obstructing the access to a private house fronting thereon, and causing other consequential injury thereto. In an action on the case against the company to recover damages for such injuries, it was held, that, while the plaintiff was entitled to recover upon other grounds, the case came, nevertheless, within the Constitution of 1874.

In *Pennsylvania Railroad v. Duncan*, 111 Pa. 352; s. c., 29 Am. & Eng. R. R. Cas. 354, the plaintiff was allowed to recover in an action on the case for damages to his property caused by the construction of defendant's road. The road was so near his property as to deprive him of the use of Filbert Street as a highway, and of four hundred feet of building front on said street. It is true, Justice Green and myself dissented in that case: but it was upon the single ground that the company had paid \$7,000,000 to the State for its property and franchises; had succeeded to all the rights of the State, including the right to construct its road without liability for consequential injuries; and we were unable to see how the State could avoid its contract by amending its Constitution. But we were all of opinion, that, but for this single reason, the case came clearly within the Constitution of 1874.

- *County of Chester v. Brower*, 10 Cent. Rep. 909, decided at the present term, was a case where the county had erected a bridge over French Creek, in the borough of Phoenixville, and in the construction of the abutments or approaches to the bridge had built a wing wall, nine feet six inches in height, immediately in front of plaintiff's houses, and only seven feet distant therefrom, thereby seriously interfering with his access thereto, and his reasonable use and enjoyment of the same. We held, reversing the court below, that the plaintiff was entitled to recover damages for this injury, in an action on the case. This was following directly in the line of the *Railroad Company v. Duncan*.

It will be observed that they are all cases where the injury arose from the construction of the road. In no one of them was there a claim for what are popularly called consequential damages, arising from the operation of the road after its completion.

In these cases injuries were result of construction of road.

It will be noticed that all our cases decided prior to the Constitution of 1874, in which compensation was denied for what are called consequential injuries, were instances in which the injuries were the result of the construction of the road; while our cases decided since 1874, and which came under the section thereof referred to, likewise involved only injuries resulting from construction. The only exception is the case of *Pennsylvania Railroad Company v. Lippincott*, before referred to, and two or three other cases, resting upon the same principle, and which were argued and decided with it, and in each of which the right to recover was denied.

The question whether, under the Constitution of 1874, a corporation is responsible, not only for property taken, injured, or destroyed in the construction or enlargement of its works, but also for injuries or inconveniences the result merely of the operation of its works, is a question of such supreme importance, and of consequences so far-reaching, that we approach its discussion with caution. If it is the mandate of the Constitution, it must be obeyed. It is our duty to give effect to the will of the people, lawfully expressed; and we shall perform it, although it stops every wheel in the Commonwealth. But it is no part of our duty to write into the Constitution something which the people have not placed there.

The importance of the case.

Just here it is proper to say that there is not a word about "consequential" injuries in the Constitution. The word itself

Nothing about consequential injuries in Constitution.

has acquired a broad, popular meaning by which many persons may be misled. In judicial proceedings it should be used intelligently, and with due regard to its proper meaning. In its application to the Constitution we understand it to mean an injury to a man's

property, the natural and necessary result of the construction or enlargement of its works by a corporation; an injury of such certain character that the damages therefor can be estimated and paid or secured in advance as provided in the Constitution. And attention is again called to the cases which I have cited, and in which the constitutional provision has been invoked, and in all of which there has been an actual, positive, visible injury, the necessary result of the original construction.

In considering a new question, it is sometimes useful to carry it out to its logical conclusion, and see where it leads us to. It is true the *argumentum ab inconvenienti* is entitled to but little force in the face of a plain mandate of the Constitution. But it is a persuasive argument in construing language which is capable of more than one interpretation; and especially is it so when we are asked to amend the Constitution by a judicial decree.

Where the doctrine of the plaintiff would lead to.

If we hold that property owners on Filbert Street are entitled under the Constitution to recover for the injuries complained of in this case, in other words, that it embraces injuries the sole result of the lawful operation of the defendant's road, where are we to stop in its application? Where is the line to be drawn? If property owners on Filbert Street may recover, why not those on Arch Street, and Race, and so far on north and south, east and west, as far as the whistle of the locomotive can be heard, and its smoke can be carried? The injury is the same, it differs only in degree. And it does not stop here. The Constitution does not apply to railroads merely. It affects corporations clothed with the power of eminent domain, including cities, boroughs, counties, and townships; it is applicable to canals, turnpikes, and other country roads. If by judicial construction we extend the Constitution to all the possibilities resulting from the lawful operation of a public work to all kinds of speculative and uncertain consequential injuries, we shall find ourselves at sea, without chart or compass to guide us. Were we to adopt such a construction we would be compelled, to use the language of Chief Justice Shaw, in *Proprietors of Locks and Canals v. Nashua & Lowell Railroad Company*, 10 Cush. 385, to extend it "to turnpikes and canals, the value of which is diminished or destroyed by loss of custom; to taverns and public houses deserted or left in obscurity; to stage-coach proprietors and companies; to owners of dwelling-houses, manufactories, wharves, and all other real estate in towns and villages from which the line of travel has been diverted. If it can extend to the next estate beyond the one crossed or touched by the railroad, why not to the next, and the next, which may be affected less in degree, but in the same manner?"

It is very plain to our view that the constitutional provision was only intended to apply to such injuries as are capable of being ascertained at the time the works are being constructed or enlarged, for the reason, among others, that it requires payment to be made therefor, or security to be given, in advance. This is only possible where the injury is the result of construction or enlargement. For how can injuries which flow only from the future operation of the road, and which may never happen, be ascertained in advance, and compensation made therefor?

Provision
applies only
to injuries
ascertainable
when works are
constructed.

It remains to say, that if the construction of the Constitution contended for be correct, then we have a liability imposed upon corporations in the operation of their works which is not now, and never has been, imposed upon individuals. No principle of law is better settled than that a man has a right to the lawful use and enjoyment of his own property, and that, if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own.

Every one
has the right
to lawful
use of his
own property.

In the late case of the Pennsylvania Coal Company v. Sander-son, 113 Pa. 126; s. c., 14 Am. & Eng. Corp. Cas. 656, it was said, by our brother Clark: "Every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*; for the rightful use of one's land may cause damage to another without any legal wrong."

No man is answerable in damages for the reasonable exercise of a right, where it is accompanied by a cautious regard for the rights of others, where there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously. Panton v. Holland, 17 Johns, 99.

We need not consume time by the further citation of authorities for so plain a proposition. It is settled law.

It is not contended that the injuries of which the plaintiff complains are in any degree the result of the negligence or unskilful operation of defendant's road. On the contrary, it has expended many millions to enable it to handle its business, and convey its passengers and freight into the heart of the city, with the least possible annoyance to persons and injury to property. As was well observed by our brother Gordon in Railroad Company v. Lippincott, the company might have hauled its enormous freight in carts or drays along Filbert Street to its present terminus, and

Injuries
not result
of negligence.

no one would have had a legal cause of complaint, although it is easy to see that the condition of property owners on that street would have been far more intolerable in such case than it is at present.

This brings us to the question whether in case a natural person were the owner of this road, and were operating it in a manner that the defendant company is now doing, he would be responsible to the plaintiff in damages. We answer this question in the negative. He would not be responsible, for the reason above given; viz., that he would have a right to the reasonable use and enjoyment of his property; and if in such use, without negligence or malice, a loss unavoidably falls upon his neighbor, he is not liable in damages therefor.

Natural person would not be responsible under same circumstances.

It is true this principle is qualified to a certain extent. A man may not carry on a business which poisons the air and renders it unhealthy in a thickly populated neighborhood, and especially in the centre of a large city. For establishments which involve danger, such as powder-mills, injuries to health, such as lead-works and manufactories of various kinds, which involve noise and disturbance to neighbors, a man must seek a secluded place, where as few persons may be inconvenienced as possible.

These exceptions to the general rule are well established, and need not be further dwelt upon; but they have no application to the case in hand. The necessities of a railroad company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own: hence the transportation of passengers and freight as near to the centre of a town as possible is in the direct line of its duty, whether that duty be performed by a corporation or individual. It is a part of the lawful use and enjoyment of property, and, where it is done without negligence, entails no legal liability therefor.

The proper use of such a work as this is a matter of great public concern. That it may also put money into the treasury of a corporation is aside from the question. The fact remains, that it is a great public benefit, essential not only to the success of the business interests of the city, but to other cities and other places as well.

Public benefit of railroads a question.

It is a metallic nerve which thrills and vibrates from one end of this vast country to the other. There are some inconveniences which, as was decided in *Pennsylvania Coal Company v. Sander-son*, must be endured by individuals for the general good. Otherwise we would have an Utopia, where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard. It might be pleasant to dwell where there is

nothing to offend the eye, the ear, or any of the senses; but in this age of rapid development in every branch of industry it would be difficult to find such a spot in the vicinity of our large cities.

We understand the word *injury* (or *injured*) as used in the Constitution to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals now stand upon the same plane of responsibility.

Meaning
of word

"Injured" in
Constitution.

That I am correct in the meaning we attach to the word *injured* appears abundantly by our own authorities. This was clearly shown by our brother Gordon in *Railroad Company v. Lippincott*. In addition to the authorities there cited by him, I will add *Lehigh Bridge Company v. Lehigh Coal & Navigation Company*, 4 Rawle, 23; *Pittsburgh & Lake Erie Railroad Company v. Jones*, 111 Pa. 204; s. c., 23 Am. & Eng. R. R. Cas. 77.

It is not necessary for us to look outside of our own State for authorities in construing our own Constitution. It may not be out of place, however, to say, that in England, where they have

English cases.

statutes containing provisions bearing a close analogy to our Constitution, and which give damages to persons whose property, although not taken, is yet "injuriously affected by the construction" of public works, such damages are not extended to injuries resulting from the operation of the road. It was said by Lord Westbury in *Ricket v. Metropolitan Railway Company*, L. R. 2 H. L. 193, "I agree with the distinction that has been taken between damage resulting from the railway when complete, or from the act of making it, and damage occasioned by the proper (not negligent) use of the railroad when made. No claim can be made for loss resulting from the use of a railway. . . . Compensation is given by the statute only to individuals who, in respect of the ownership or occupancy of lands or tenements, sustain loss in or through the construction of the railway or the execution of the incidental works." To the same point are *Hammersmith & City Railway Company v. Brand*, L. R. 4 H. L. 171; *Caledonian Railway Company v. Walker*, L. R. 7 App. Cas. 259; *Penny v. Southeastern Railway Company*, 7 Ellis & Bl. 660; *Glasgow Union Railway Company v. Hunter*, L. R. 2 H. L. Sc. 78.

The language of the Constitution is not equivocal, and is entirely free from ambiguity. The framers of that instrument

Intention
of framers of
Constitution.

understood the meaning of words, and many of them were among the ablest lawyers in the State. Two of them occupy seats upon this bench. Hence, when they extended the protection of the Constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we

must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence and without malice. Such injuries have never been actionable, since the foundation of the world.

Judgment reversed.

STERRETT, J., dissenting. — This contention, involving the same questions that were presented in *Pennsylvania Railroad Company v. Lippincott*, and others, 116 Pa. 472; s. c., 30 Am. & Eng. R. R. Cas. 339, hinges on the construction of art. xvi. sect. 8 of the Constitution; viz., "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed in the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

The question presented.

In effect, the obligation thus ordained is written into every grant of power to take private property for railroad purposes, or for any other specified public use, and requires the grantee of that privilege to make just compensation, not only for property actually taken (as was the case under former Constitutions), but also for property injured or destroyed in consequence of the legitimate exercise of the grant, in the manner and for the purposes contemplated by the charter of the company. Pa. R. Co. v. Duncan, 111 Pa. 352; s. c., 29 Am. & Eng. R. R. Cas. 354. If it is insisted on, that compensation must be paid before such injury or destruction. We have accordingly held very recently, in *O'Brien v. Pennsylvania Schuylkill Valley Railroad Company*, 11 Cent. Rep. 679, that if compensation for such consequential injury to adjacent real estate be not paid or secured in advance, suit may be brought immediately after the work is undertaken, in which all damages, past as well as prospective, may be recovered; that the injury for which the constitutional remedy has been provided is single and indivisible, and consequently only one action will lie therefor.

Effect of the provision. When compensation must be made.

The injury to private property (no part of which is actually taken) resulting from carrying out, with reasonable and proper care, the public purposes for which a corporation is created and vested with the right of eminent domain, is regarded in the nature of a *servitude*, fastened on the injured property by the *locum tenens* of the Commonwealth for

Injury to property not actually taken.

the public benefit, for which compensation is to be made in advance, and once for all. The Constitution places such claims for compensation on precisely the same footing as claims for damages resulting to private property from an actual taking of a part thereof for public use.

The history of the section under consideration, and the evils intended to be remedied thereby, are too generally familiar to require extended notice; but, in view of the importance of the subject, it may be well to state briefly how the provision, in its present form, came to be incorporated in the Constitution.

Under the provisions of the common law, every public improvement was preceded, if necessary, by a writ of *ad quod damnum*, to

ascertain what damages, if any, subjects of the Crown would sustain thereby (1 Bl. Com. 139); but Penn's concessions of 1681, 3 Yeates, 372, had the effect of so relaxing that wholesome rule that compensation

Provisions of
the common
law and Consti-
tution of 1838.

for private property taken for such public purposes as turnpikes, etc., was provided for, if at all, by the Legislature, as matter of grace, and not of right. Then followed the constitutional guaranty of the people themselves, substantially reordained in 1838, prohibiting their representatives from investing "any corporate body or individual with the privilege of taking private property for public use without requiring such corporation or individual to make compensation to the owner or owners of said property, or give adequate security therefor before such property shall be taken." Const. 1838, art. vii. sect. 4.

In the absence of special charter obligation or legislative provision, more comprehensive and stringent than the section just

quoted, corporations were not liable for any thing short of an actual taking. In other words, without such taking, they were never liable, under that section, for what are termed consequential damages.

Hardship of
the old pro-
visions.

Cases of extreme hardship arose in which private property, no portion of which was taken, was greatly damaged in consequence of the lawful exercise of corporate authority delegated for public purposes.

Monongahela Navigation Co. *v.* Coons, 6 Watts & S. 101, and O'Connor *v.* Pittsburgh, 18 Pa. 189, are illustrations of this. In the former the company, under legislative authority, constructed dams in the Monongahela River, one of which caused back water for several miles in a tributary of that river, and greatly injured Coons' mill located thereon. This court, reversing the judgment obtained by him for the damages, said, "The plaintiff's mill was not taken or applied, in any legitimate sense, by the State or by the company invested with its power; nor can it be said that he was deprived of it. . . . The State is not bound beyond her will

to pay for property which she has not taken to herself for public use." Subsequently, however, the Legislature provided a remedy under which the owner of the mill was compensated for the damages resulting from the construction and maintenance of the dam. *Monongahela Navigation Company v. Coon*, 6 Pa. 379.

O'Connor v. Pittsburgh was a case of still greater hardship. Chief Justice Gibson, declaring "It is inequitable to injure the property of an individual for the benefit of the many," and suggesting that the Legislature should provide a remedy, said, "To attain complete justice, every damage to private property ought to be compensated by the State or corporation that occasions it; and a general statutory remedy ought to be provided to assess the value. The constitutional provision for the case of private property *taken* for public use extends not to the case of property *injured* or *destroyed*; but it follows not that the omission may not be supplied by ordinary legislation. No property is taken in this instance; but the cutting down of the street, consequent on the reduction of its grade, left the building useless, and the ground on which it stood worth no more than the expense of sinking the surface of it to a common level. The loss to the congregation is a total one, while the gain to the property holders in the neighborhood is immense. The Legislature that incorporated the city never dreamed that it was laying the foundation for such injustice; but, as the charter stands, it is unavoidable."

This is perhaps the first appeal that came from the bench in behalf of the necessity for some general provision requiring compensation for property "injured or destroyed," in addition to the then existing remedy for property actually taken for public use; and while no general measure of relief was provided by the Legislature, the subject was never lost sight of by the people until it was incorporated in the present Constitution.

When the Constitution of 1838 was adopted, railroads were in their infancy; but they soon multiplied rapidly, and the Legislature, in providing liberally for their needs on the one hand, and for the protection of private property rights to some extent on the other, enacted laws by which a mode of compensation was provided, not only for property taken, but also for injuries resulting to the residue of a property part of which only was taken for railroad purposes. These, together with similar provisions in special cases, were a great advance on the constitutional guaranty of 1838, which, as we have seen, required compensation only for property actually taken: but they left unprovided for cases of direct and serious injury and damage to adjacent private property no part of which was actually taken for public use; and when the people resolved to change their organic law, they determined not

Same. The remedies proposed under the new Constitution.

only to provide specially for that omission, among others, but also to place the whole subject beyond the control of their representatives in the Legislature. No one familiar with the history of the times, or who reads the debates in the constitutional convention, can for a moment doubt the accuracy of this statement.

Referring to the justice and necessity of requiring compensation for damages to adjacent property no part of which is taken, resulting from the construction and careful operation of railroads, a distinguished delegate from Philadelphia said, "When a railroad runs through a man's property, close to his barn or house, you take into view the disadvantages caused by the close proximity of the road, the danger of fire, the annoyance from sparks, smoke, etc. . . . But if the road was not to run through the man's property, but near it, no matter what injury to his property, he would get just nothing." 3 Debates, 589.

Same. The
intention of
the convention.

The rule as to measure of damages here referred to is the familiar one, adopted in *Schuylkill Navigation Co. v. Thoburn*, 7 Serg. & R. 411, and recognized in so many of our cases, among the last of which is *Setzler v. Pennsylvania Schuylkill Valley Railroad Co.*, 2 Cent. Rep. 357, 112 Pa. 56; namely, the difference between what the property would have sold for before the construction of the road and what it would have sold for after the road was completed, taking into consideration the risk of fire necessarily incident to the proper and legitimate use of locomotives, and all such matters as, owing to the peculiar location of the road, may affect the convenient use and future enjoyment of the property, and excluding every thing of a speculative nature.

On the same subject the distinguished president of that body said, "There is no reason why a man in the neighborhood of a public work, injured by the construction of it, should not recover damages, just as much if his property is not taken as if it is. For instance, the corner of a man's farm is taken; he comes for damages. What is the injury done to him by that in the taking of his property? It is the value of the part of the farm taken: but the value of the whole has been injured; that is, his property in the vicinity of the work has been injured. He recovers damages every day for that; and yet, if it so happens that they must go just an inch outside of the corner of his farm, and he may be equally injured, he cannot under this blind clause, as I may call it, in our present Constitution, recover a dollar of damages. Sir, let us try and regulate that, and restore it to the reason, and the experience and protection of the common law, by providing, that, when these works are made, the property injured by them, whether part of that property is taken or not, shall be entitled to recover damages; that is, if the value of the property

in the neighborhood is depreciated, its owners shall recover the difference between what the property would have sold for before the work and what it would sell for afterwards." 3 Debates, 597.

These learned gentlemen not only "understood the meaning of words," but they accurately voiced the views and purposes of those who framed the section in question, and also of the people by whom it was ratified.

Another phase of the evil just referred to was the injury to abutting property owners by the authorized location and maintenance of railroads on streets and other public highways. In a long line of cases prior to the adoption of the present Constitution, commencing with Philadelphia & Trenton Railroad Company, 6 Whart. 25, it was held that the constitutional provision of 1838 did not prohibit the Legislature from granting to a railroad company the privilege of constructing and operating a railroad on public streets or highways without requiring compensation to be made to abutting property owners; and, however much their property might be injured and depreciated in consequence thereof, they were without redress.

**Injury to
abutting prop-
erty caused by
railroads in
streets.**

Cleveland & Pittsburgh Railroad Co. v. Speer, 56 Pa. 325, is a case in which a verdict for \$1,362.50 damages caused by noise, smoke, offensive smells, etc., whereby plaintiff was deprived of the proper enjoyment of his dwelling, etc., was set aside because the railroad company was lawfully occupying the street, without any obligation to make compensation for any injury resulting from the legitimate operation of its road.

These are some of the evils that called loudly for a constitutional remedy; and from the history of the section adopted, and every thing connected therewith, it is perfectly clear that it was the purpose of its framers, as well as the people they represented, to prevent the building of railroads, or the prosecution of any great public enterprise, at the involuntary expense or sacrifice in property of any private citizen, either for construction, maintenance, or operation. This is so plainly written on every page of that history, that the wayfarer, although not learned in the law, cannot fail to read and understand.

**The purport of
the new pro-
visions.**

In view of all the foregoing and other considerations, it was deemed just and equitable to make general and permanent provision for compensation for property injured or destroyed without actual taking, as well as for property taken for public use. The result was the adoption of the eighth section first above quoted. As we have already seen, it differs materially from the old provision, not only in form but in comprehensiveness. While the

former is merely an inhibition on the legislative power to delegate the right of eminent domain, the latter, without restricting the exercise of that power, defines a class of persons, artificial and natural, and makes it obligatory on them to compensate the owners of property either *taken, injured, or destroyed* in the lawful prosecution of the work or business for which they are respectively invested with the right of taking private property for public use.

From what has been said, it might appear strange that there should ever have been any serious difference of opinion as to the meaning of the section; but, while those affected by it knew that they were bound, as before, to pay for property actually taken, there was a backwardness on the part of some in recognizing the first measure of their obligation to persons whose property had been *injured* but not taken by them in the exercise of their corporate authority, and accordingly several cases arose, involving the question of liability for injuries to the residue of property, part of which had been taken, and also cases grounded solely on injuries to adjacent private property without any taking.

Pusey v. Allegheny, 98 Pa. 522, is an instance of the former. In that case, after reciting the section under consideration, it is said, "This is an advance upon the limitation of the right of eminent domain, as found in the Bill of Rights both of the present Constitution and that of 1838. Corporations in whom the Legislature has vested this right are by this section made liable for damages resulting to private property from the construction, use, or alteration of their works, ways, or improvements; in other words, to such damages as are ordinarily called *consequential*. This being now the supreme law of the land, it must govern the case under consideration; and it is idle to recur to decisions and legislation, the authority of which, as to all present and future cases, is by this provision annulled."

Other cases of the same class might be cited, in which the same construction is recognized and adopted, viz., that compensation is to be made for injuries resulting from the *use or operation*, as well as from the *construction or enlargement*, of public improvements, but it is unnecessary. That construction had become so generally understood and acquiesced in, that in *Pennsylvania Railroad Company v. Duncan*, *supra*, a case grounded solely upon injury resulting partly from construction, but chiefly from legitimate operation of the railroad, counsel did not think worth while to insist on the position that the Constitution makes no provision for injuries resulting from *operation*, but only from *construction* of the road, strictly considered.

The property in that case, shown to have been injured to the

extent of \$20,000, almost exclusively by the operation of the road, is also situated on the north side of Filbert Street near the company's viaduct, but, like the plaintiffs in this case, no part of it was taken or even touched by the railroad. The case was confessedly one in which plaintiff would have been utterly remediless, except for the word *injured* in the section under consideration.

Pittsburgh Junction Railroad Co. *v.* McCutcheon, 5 Cent. Rep. 759, was also a case involving simply the question of *injury* without any taking whatever. The plaintiff below was tenant for a term of years of the property injured by the construction and legitimate operation of the company's elevated road in the city of Pittsburgh. Under the old Constitution he would have been absolutely remediless. The action as amended and tried was case, grounded solely upon the word *injured*. There was a verdict in his favor for \$1,116; and on writ of error to this court the judgment was affirmed in a *per curiam* opinion by the present chief justice, in which it is said, *inter alia*, "Under the new Constitution, the plaintiff was entitled to compensation for all the damages, direct and consequential, which he suffered or might suffer in consequence of the building and operation of defendant's road."

The word *operation* was not inadvertently used in that case. The plaintiff's claim for damages, like the claim in Railroad *v.* Duncan, *supra*, depended almost entirely on the question whether the company was liable for injuries resulting from the use or operation of its road. All the rulings of the court, so far as they were excepted to and assigned for error, were affirmed. One of them was the refusal of the court to charge, as requested, "that no damages can be recovered in this action for injuries resulting from the operation of the road after its construction." Another was the refusal to charge "that damages arising from noise, smoke, and dirt in the passage and re-passage of trains upon the road are not to be taken into consideration in estimating plaintiff's damages in this case." Another was, in charging that "the ordinary danger from accidental fires to the buildings, not resulting from negligence, and, generally, all such matters as, owing to the peculiar location of the road, may affect the convenient and future enjoyment of the property, are proper subjects for consideration."

These and other rulings, to the same effect and in full accord with previous deliverances of this court, were affirmed without dissent. They are quoted at some length, because the elements of damages and the principles involved are, in my judgment, identically the same as in the present case, and the case of Pennsylvania Railroad Co. *v.* Lippincott, *supra*.

The facts in the present case. The present suit was brought by the owner of house and lot No. 1711, fronting on the north side of Filbert Street, Philadelphia, to recover damages for injuries resulting from the construction and legitimate use of the company's viaduct or elevated railroad as a public highway for the transportation of passengers and freight.

The road, known as the Filbert Street extension, commences near Thirty-second and Market Streets, and running eastwardly crosses the Schuylkill opposite Filbert Street, and thence east, longitudinally and over the cart-way of that street, to a point near Twenty-second Street, where it leaves the street and runs thence along the south line thereof to Fifteenth Street at Broad Street Station. From the river to the point where it curves and passes to the south side of the street, the superstructure over the cart-way of the street is supported by a sufficient number of high iron pillars set in the street, near the sidewalks thereof, leaving the cart-way as well as the sidewalks otherwise unobstructed. From the point where it passes to the south side of the street, the superstructure rests upon substantial brick walls, about twenty feet high, and arches spanning the intervening cross streets. From the river to Twenty-second Street the northerly side of the viaduct is a few feet south of the north line of Filbert Street, and from the curve where it leaves the street to its terminus at the station it runs parallel with and fifty-one feet from the northerly side thereof.

The proof of material and direct damage to plaintiff's property resulting from the construction of the viaduct, the noise of over 1,400 passing and repassing trains daily, the consequent emission of steam, sparks, cinders, smoke, etc., and vibration to the extent of cracking the walls of the house, was clear and convincing. According to the testimony, the effect on the house was such as to greatly impair its value, and render it almost uninhabitable; and under a fair and impartial charge, submitting the question of damages to the jury, the verdict was in favor of plaintiff for \$4,980, from 30 to 40 per cent of the estimated value of the property before the road was constructed.

Relying on the recent ruling in *Pennsylvania Railroad Co. v. Lippincott*, *supra*, it is now proposed to reverse the judgment, and virtually hold, as was done in that case, that, as to this and all similar cases, the constitutional obligation, to make just compensation for private property injured in consequence of the exercise of authority delegated to the company for the public benefit, is a mere rope of sand, notwithstanding that obligation is virtually written into the only warrant the company has for doing what it has done in the past, and what it may rightfully do in the future.

It is thus apparent that the question is one of more than ordinary importance, and far-reaching in its consequences. With great deference to the judgment of those who see the matter in a different light, I have, therefore, ventured to cite some authorities and offer some suggestions, bearing upon the construction of the section in question, and in support of what appears to me the manifest justice and legality of the judgment of the court below.

For some time prior to the ruling in *Pennsylvania Railroad Co. v. Lippincott*, *supra*, and especially after the decisions in the *Duncan* and *McCutcheon* cases, *supra*, it was confidently believed that every doubt as to the meaning of that section had been dispelled, and that thenceforth the just and equitable provisions of the constitutional obligation to make compensation, not only for property *taken* but also for property *injured* or *destroyed* by those "invested with the privilege of taking private property for public use," would be enforced in the same spirit of fairness and justice in which they were conceived and afterwards adopted by the people as part of their organic law, and that, too, without stopping a single wheel, or relegating anybody to that dreaded "Utopia where the whistle of the locomotive, the hum of the spindle, and the ring of the hammer are never heard." But that well-grounded belief, warranted, as I think, alike by the language of the Constitution and repeated deliverances of this court, was at least sadly shaken by the decision referred to. If time permitted, it would not be difficult to show that it is contrary to the spirit if not the letter of the Constitution, and in a very large class of cases subversive of rights of property guaranteed by that instrument.

The Lippincott case opposed to former construction.

Plaintiff in that case, and three other property owners, all on the north side of Filbert Street, claiming to be within the protection of the Constitution, severally brought suits for damages resulting, as in the case of the present plaintiff, from the construction and legitimate use of the company's road; and after fair trials, in which the court below followed the previous rulings of this court in cases referred to, they obtained verdicts aggregating over \$29,000, which on writs of error were set aside, the majority holding, in substance, that inasmuch as "no part of plaintiff's property, nor any right of way or other appurtenance thereunto belonging has been taken or used in the erection or construction of said viaduct," there was not, nor could there be, any injury to their property resulting from the construction of the viaduct; and, as to damages caused by the maintenance and proper use of the road for its intended purposes, there could be no recovery,

The result of the Lippincott case.

because adjacent property thus injured is not within the protection of the Constitution. The sum and substance of that decision is that, notwithstanding plaintiffs below were confessedly injured and damaged to a very large amount by the company's exercise of delegated authority, they were as remediless as they would have been under the old Constitution.

Such a narrow construction of the section under consideration was never dreamed of by those who took an active part in moulding it into its present form, as the debates of the Convention will show, nor was it so understood by the people who adopted it; nor is it the construction heretofore clearly recognized and adopted by this court in several cases, some of which have been specially noticed.

The crowning vice of the construction is in restricting the words *injured* or *destroyed* to such injuries as result wholly from construction, alone, and holding that there can be no recovery for injuries resulting from the use of the road for the very purpose for which its construction was authorized by the Legislature. If such substantial and permanent structures were designed to be temporary things of beauty, on which to feast the eye, there might be some reason in this; but who does not know that they are to be maintained perpetually in the prosecution of the business for which the company was incorporated? In the case of actual taking, whereby the company acquires an easement or right of way over the property appropriated, the purpose for which the servitude is thus fastened upon the land, the duration and manner of enjoyment, the injury to remaining land resulting therefrom, are all taken into consideration. Why should not this be done also, where there is a direct and manifest injury unaccompanied by actual taking? It was so held in the cases of *Railroad v. Duncan* and *Railroad v. McCutcheon*, *supra*, both of which were cases of injuries resulting from operation of the respective roads, without any taking.

It may be asserted, without fear of successful contradiction, that in principle they are both identical with the present and other Filbert Street cases. How comes it, then, that the judgment for damages to Duncan's property on the same side of Filbert Street was affirmed, and the judgments in favor of Lippincott and others, for precisely the same kind of damages, are reversed? It was only because of a radical and unwarranted departure from the theretofore recognized and correct construction of the section in question, which as we have seen was intended to protect private property from virtual confiscation to the extent that it is directly and necessarily damaged for the public benefit and the benefit of the *locum tenens* of the State. This

Objections to
the construc-
tion given.

unjust and inequitable result was made possible only by ignoring or rather reversing the cardinal rules of construction applicable to remedial statutes, and, more particularly, to constitutional provisions for protection of person or property. The object of construction, as applied to the latter, is to give effect to the intent of its framers and the people in adopting it. The words of a constitution, being the language of the people, are to be taken in their popular, natural, and ordinary meaning, rather than in a strictly literal or in a technical sense, unless the context or the very nature of the subject indicates otherwise. Cooley, Const. Lim. 55 ; 1 Story, Const. 400.

Rule for proper
construction of
constitutional
provisions.
Authorities.

Speaking of the duty of resolutely upholding provisions intended for security of person or property, Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. 635, says, "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right; as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be, *Obsta principiis*."

Our own books are full of cases illustrating the wisdom and justice of the rule referred to. In *Buckwalter v. Black Rock Bridge Company*, 38 Pa. 281, the company's charter provided that, if the bridge was located "within half a mile" of Buckwalter's Ferry, referees should be chosen "to assess the damages which said Buckwalter might sustain by reason of the erection of said bridge." The referees found that the ferry would be "depreciated by reason of the erection of said bridge, as proposed within half a mile of said ferry, by diversion of the travel thereupon," and they accordingly assessed the damages at \$1,200. The award was excepted to and set aside, because "diversion and loss of travel" were not such an injury as is contemplated by the words of the charter; but this court sustained the construction given by the referees to the words, "by reason of the erection of said bridge," and re-instated the award, holding that these words comprehended the purpose for which the bridge was erected, and the use intended to be made of it; and that hence the owner of the ferry was entitled to compensation for the depreciation of his ferry, resulting from the diversion of travel from it to the bridge.

If the court had been disposed to stick in the bark, and adopt

a narrow but perhaps literal construction of the bridge company's charter, it might have impaled the ferryman on a very sharp point, by holding that the words of the charter meant damages resulting solely from the *erection* of the bridge, and not from the *use* of it after it was erected ; but such a construction would have been manifestly erroneous and unjust.

Again, in *Lycoming Gas & Water Company v. Moyer*, 99 Pa. 615, the charter provided, that, "if in the location of said works, an injury shall be done to private property and the parties cannot agree," viewers shall be appointed, etc. The company having located its works with the view of utilizing, in part, the water of a certain stream, whereby, when the works were put in operation, the flow of water from the stream through a mill-race below was considerably diminished, it was held that the owner of the mill-race, although not injured by the location of the works, strictly considered, was nevertheless within the protection of the obligation of the company to make compensation for injury to private property done "in the location of" its works, and therefore entitled to damages for the injury he had suffered and would thereafter sustain, by the diminution of flow in his race, estimated on the footing of the continuing and permanent use to which part of the water of the stream was intended to be applied.

Authorities of like import might be multiplied almost indefinitely, showing conclusively that remedial statutes, intended to protect private rights, are never *narrowly* and *literally*, but always *liberally* construed, so as to effectuate the object intended ; but those already cited must suffice.

The rule of construction for which I contend is distinctly recognized by our brother Paxton in the very recent case of *Chester County v. Brower*, 10 Cent. Rep. 909, wherein, referring to the same section now under consideration, he says, "The language of the Constitution is to be construed liberally, so as to carry out and not defeat the purpose for which it was adopted."

If the slightest degree of that liberality had been exercised in this case, the plaintiff below, damaged to the extent of nearly \$5,000, as established by the verdict of the jury, could not have been turned out of court without a cent.

In the opinion of the majority in this case the question is suggested : "Whether in case a natural person were the owner of

this road, and were operating it in the manner that the defendant company is now doing, he would be responsible to plaintiff for damages?" and it is promptly answered in the negative : "for the reason . . . that he would have a right to the reasonable use and enjoyment of his property, and if in such use, without negligence or malice, a loss unavoidably falls upon his neighbor, he is not liable in damages therefor."

Liability of
natural person
under similar
circumstances.

This is a broad and sweeping proposition ; and, in view of the established facts of this case, I venture with great respect and deference to suggest that it is as unsound as it is broad. If a private person can acquire control of property on one side of a populous street, in the heart of a city, and so use it, for an extraordinary purpose, as to permanently damage property on the opposite side of the street to the extent of 30 to 40 per cent. of its market value, and not be liable, the maxim, *Sic utere tuo ut alieno um non lædas*, is practically obsolete, and the law of nuisances must be modified accordingly. Pollock, Torts, 330 ; Wood, Nuisances, 577, 584, 703, 679, 693 ; Pottstown Gas Co. v. Murphy, 39 Pa. 257 ; Columbia Delaware Bridge Co. v. Geisse, 35 N. J. Law, 558, 564.

Conceding for argument's sake that the word *injury*, or *injured*, as used in the Constitution, means "such a legal injury as would be the subject of an action for damages at common law," and that "for such injuries both corporations and individuals now stand upon the same plane of responsibility," it is very clear that the facts of this case, as established by the verdict, unquestionably furnish the grounds for such an action ; and if it were not for the authority, vested in the railroad company by the Legislature, to do the acts complained of, for the public benefit, such action would undoubtedly lie against it. But, as we have seen, the company's warrant to do these acts is coupled with the obligation to make compensation for the injuries resulting therefrom ; and hence it should be required to do so.

Meaning of
word injury.

The *argumentum ab inconvenienti*, that, if the Filbert Street property owners were permitted to recover, the door would be thrown wide open to every property owner, at every point of the compass, and "as far as the whistle of the locomotive can be heard or its smoke be carried," to bring suit for damages, is more imaginary than real ; and it may be answered by the fact that the road has been completed and in operation for about seven years, and no such suits have ever been heard of, nor is it likely that they ever will be ; because, under our recent ruling in *O'Brien v. Railroad Company*, *supra*, all such actions are now barred by lapse of time. But, if it were otherwise, what have such considerations to do with the construction of a clause in the Constitution ? Surely it is not to be so construed as to exclude meritorious claimants who are within its protection, because possibly the number of claimants might happen to be undesirably large. It is well settled, moreover, that there never can be any recovery for remote, uncertain, and speculative damages.

That great
number of suits
would be
brought, an
objection.

This contention involves other matters worthy of special

notice, but want of time precludes their consideration at present. Enough has been said, however, to show that the departure, as I regard it, in *Railroad Company v. Lippincott*, was a mistake that ought to be promptly corrected; and I would, therefore, unhesitatingly affirm this judgment.

Consequential Damages to Land not actually taken.— See *Pennsylvania R. Co. v. Lippincott*, and note, 30 Am. & Eng. R. R. Cas. 399-406.

The Rule in Wisconsin.— In *Heiss v. Milwaukee & W. R. Co.*, 34 N. W. Rep. 916, the Supreme Court of Wisconsin had before it much the same question as was presented to the Pennsylvania court in the principal case. In that case it appeared that the petitioner applied to the circuit court to compel a railway company to institute condemnation proceedings against her property, and to have her damages assessed for injury caused by the construction of the road through a street on which her property was situated. The court found that the railway had been built wholly on the westerly half of the street, while petitioner's property abutted on the east side; that the road-bed where it passes the property of the petitioner was raised about fifteen inches above the ordinary grade of the street; that the east half of the street had been left at about the same grade as before the construction of the road; that the construction of the road had rendered the premises much less valuable; that the failure of the railway company to restore the street to its former condition had materially injured and destroyed petitioner's right to the use of the street; and that, in order to so restore the street, it would be necessary for the company to enter upon that part of the street to which petitioner had title in fee. The court *held*, that, as it was shown that the railway company had not taken any property belonging to petitioner, the petition was properly dismissed.

Chief Justice Cole said, "It is very obvious that the railroad company had not in any way taken or appropriated the appellant's land for the use of its road, nor does it propose doing so. It has merely constructed its road-bed along the public street where it had express authority, under the statute, to construct it, and has not even touched or invaded the appellant's property. We apprehend the learned counsel for the appellant would not contend, if there were no street there, that the company had not the right to construct the road in the manner it did, nor would he claim that in thus constructing it there had been a taking of the appellant's property for public use within the meaning of the Constitution. True, the roadbed or embankment comes near to her west line; produces, if you please, indirect or consequential damages; but it does not touch her property. So it is plain, as it appears to us, that there has been no taking or appropriation of any part of the appellant's land by the company for the use of its road. Says Mr. Sedgwick, in his work on the Construction of Statutory and Constitutional Law, p. 455, note *a*: 'To constitute the taking spoken of in the constitutions of most of the States, there must be some actual, direct, physical interference with the property, or some part thereof. It is not necessary that the owner should be divested of all estate in the whole or any part of the particular piece of property, nor that exclusive possession of the whole nor of any part thereof should be acquired as against him, but there must be some direct and physical interference with some part of the particular piece of property in question. As a consequence of this doctrine, indirect and consequential injuries to property, depreciations in value, and the like, unaccompanied by any direct physical interference, do not constitute the taking.'

"The law is well settled in this State, that, if there is the required physical interference with, or taking of some portion of, a given piece or tract, the owner

is entitled, as a part of his compensation for that taking, to damages, for the resulting consequential injury to the rest of the piece or tract. Many cases could be cited from our reports, where this doctrine is recognized and applied. But it is apparent that the case at bar does not come within that principle, for the reason already given, that there has been no taking of any portion of the appellant's lots. The case of *Chapman v. Railroad*, 33 Wis. 629, goes upon the rule of law above announced. There was a direct physical interference with the owner's property for which damages were awarded, including the value of his riparian rights, which were destroyed. In *Buchner v. Railway*, 56 Wis. 403, and 60 Wis. 264; s. c., 14 Am. & Eng. R.R. Cas. 447, there was also an actual invasion of the plaintiff's property, a cutting down and excavating of the street on his land, so as to adjust the grade to that of the railroad track. In 56 Wis., Mr. Justice Lyon says in the opinion, 'If, as in this case, the railway company, in order to perform its legal obligation to restore the highway it occupies with its track, is compelled to dig and carry away the soil of any person, thereby depreciating the value of his property, it would seem that this can be lawfully done only by the exercise of the right of eminent domain, an indispensable condition to the lawful exercise of such right being that just compensation must be made to the owner of the property taken.' The difference between the Buchner case and this is important and radical. There property was actually taken by the company; here it is not. The appellant's estate is undisturbed; no entry whatever has been made upon her land, or interference with it. Her fee extends to the centre of the street, no farther. The east half of the street remains in the same condition it was in before the road was constructed. But the counsel says, if the railroad company performed its legal duty by restoring the street to its former state of usefulness, it would be necessary for it to enter upon the east half of the street, and make and maintain a fill upon that part of the street of the same height as the grade of its road-bed, and that this would bring the case within the principle of the Buchner case. But the answer to this position is: The company has made no such fill, and condemnation proceedings cannot be resorted to, to compel the company to perform a legal duty of restoring the street. It well may be that the company has been delinquent in the discharge of that duty; but does that furnish a ground for resorting to this proceeding? The grade of streets is under the control of municipal authorities; and a private party has no right to interfere in such a matter, except under peculiar circumstances. Again, the counsel says the appellant places her claim for condemnation and compensation upon the ground that, by reason of the occupation of Division Street by the railroad, her means of ingress and egress to her lots are largely cut off and destroyed, to her serious injury. But we do not understand that such consequential damages to land, by which its use and enjoyment are rendered less convenient and valuable, constitute a taking of property for public use. We have already said, that, to entitle the owner to compensation for taking, there must be an actual taking or physical interference with his property, in the strict sense of the term. The case of *Hanlin v. Railway Co.*, 61 Wis. 515, is a direct authority against the position that such consequential damages to property constitute a taking within the Constitution. Indeed, we think counsel failed to find a case, either in our own reports or decisions elsewhere, which sustains his contention that a condemnation proceeding will lie for such indirect or consequential injuries."

ROUSHLANGE

v.

CHICAGO & ATLANTIC R. CO.

(Indiana Supreme Court, May 29, 1888.)

Compensation for Encroachment beyond Right of Way. — Where a railroad company, although it has bought and paid for its right of way, encroaches upon the adjoining land by filling in on an embankment over a marshy place, whereby an upheaval on such adjoining land is caused, it must respond in damages.

APPEAL from Circuit Court, Lake County; Elisha C. Field, Judge.

Action by John Roushlang against the Chicago and Atlantic Railway Company to recover damages for encroachment on land. There was judgment for defendant, and plaintiff appeals.

Martin Wood and Thomas J. Wood for appellant.

J. S. Slick and W. O. Johnson for appellee.

ZOLLARS, J. — It is averred, in appellant's complaint, that the railway company had constructed its road across his land, "after purchase made and consideration paid for the right of way by the defendant to the plaintiff, and after the plaintiff had conveyed the right of way to the defendant by a good and sufficient deed." It is averred also, that a portion of the land over which the railroad was constructed was marshy; that through that portion the railway company made an embankment about twelve feet high; that, after the road had been used for about six months, the embankment thus constructed began to sink; that, to keep the grade up to the original height, the railway company deposited upon the top of the embankment a large amount of earth, sand, and other material; that, as the same was deposited, the embankment kept sinking until the road-bed finally became settled and solid; that a large amount of the earth and other material thus deposited, as it sank, spread and extended under the surface of the land beyond the land of the railway company, and upheaved the plaintiff's land adjoining the right of way, and rendered worthless several acres of it, etc. There is no charge of negligence against the railway company, unless the facts stated show it to have been negligent in the construction of its road. Claiming that no negligence is charged, its

counsel insist that the complaint does not make a case against it, admitting all of the averments therein to be true, as the demurrer does.

These general propositions are established by the authorities : —

First, A deed of land to a railway company for its right of way is presumed to include a license to do what is necessary and lawful in the construction and management of its road thereon, to the same extent and with the same effect as if the land had been compulsorily taken by condemnation proceedings. But, notwithstanding the deed, the company remains liable for injuries arising from negligence and unskilfulness in the construction of its road. *Pierce R.R.* 133, 134. See, also, 1 *Ror. R.R.* 313, 314; *Mills Em. Dom.* (2d ed.) sect. 110.

Certain general propositions established by the authorities.

Second, As, in condemnation proceedings, it is presumed that the assessment of damages includes all damages proper to be assessed, so deeds of rights of way are presumed to include all damages arising from the proper construction of the road. The price agreed upon is presumed to be the same that the commissioners would have arrived at on an assessment of damages. *Id.*; *Railway Co. v. Smith*, 111 Ill. 363.

Third, The rule as to what damages may be assessed by the commissioners in a condemnation proceeding is that the value of the land appropriated should be considered, together with any injury to the residue of the land naturally resulting, or that might reasonably be expected to result, from the appropriation and construction of the road in a proper and lawful manner. *Railroad Co. v. McClure*, 29 Ind. 536; *Railroad Co. v. Horn*, 41 Ind. 479 (484); *Railway Co. v. Allen*, 100 Ind. 409 (412); *Railroad Co. v. Daniel*, 20 Grat. 344; *Railway Co. v. Smith*, *supra*.

Fourth, Such assessment of damages will not be presumed to cover damages resulting from the negligent construction of the road, or any portion of it, nor damages resulting from improper encroachments upon land outside of the right of way.

The above-stated rules of law require a holding here that, unless the rights of the railway company are enlarged, or its liabilities limited, by the terms of the deed, appellant can recover such damages, and only such damages, as might properly have been assessed had the right of way through his land been taken by condemnation proceedings instead of by grant. The complaint shows that the appellant granted to the railway company a right of way through his land for the construction and operation of its road. It is not claimed that the deed conveyed any rights except the right of way, and such as are incidental to the general grant. It is not stated in the complaint how wide the strip thus

Railroad encroaching upon adjoining land is liable.

granted was, but it is shown that, in the construction of the road, the company has occupied land outside of the strip granted. The general rule is, that, in the construction of its road upon an acquired right of way, a railway company is not liable beyond the compensation assessed or agreed upon, where such compensation is fixed prior to the building of the road, unless it is guilty of negligence in such construction. That rule, however, must be limited to cases where the railway is constructed upon and within the limits of the right of way so acquired. Clearly, if a railway company should condemn or purchase a right of way of a certain width, and pay the damages assessed or agreed upon as resulting from the construction of its road upon that strip, it could not successfully claim the right to so construct its road as to cover land outside of the limits of such strip, without the payment of additional compensation, or additional damages resulting from such construction. If that were so, the company might condemn a strip of land twenty feet wide, and in the building and maintenance of high, and necessarily wide, embankments, cover and occupy a strip fifty or hundred feet wide, without the payment of compensation or damages resulting from such occupancy. The real question in the case before us is not one of negligence, but of an encroachment upon land outside of the company's right of way. When the company discovered that its road-bed was sinking, could it, without making compensation, or the payment of damages, have gone upon appellant's land and constructed walls or banks to prevent the road-bed from sinking and spreading? Clearly not. That it did not do; but, what in effect was the same thing, it filled in earth and other materials until the embankment spread out beyond the right of way upon appellant's adjoining lands, and upheaved the surface, and caused the injury described in the complaint. It may be that the company had no knowledge that the filling would cause the spreading of the embankment and the upheaval of appellant's land. Whether or not it had such knowledge is not stated in the complaint, nor do we think that it is material in this case. By reason of the filling upon the embankment, it was caused to spread upon appellant's land, and caused the injury. That the railway company may have had no knowledge that the filling would cause the injury, is not sufficient to exonerate it from liability. The fact remains, that appellant granted to the railway company a strip of land upon which to construct and operate its road, and it has so constructed it as to make it rest, not only upon the strip thus granted, but also upon his adjoining land not granted. The railway company is thus occupying land which was not granted to it, and which neither party intended should be either granted to it or occupied by its road. The road is no less an encroachment upon appel-

lant's land because its foundation is beneath the surface. The fact might affect the amount of damages, but it does not alter the rights of the parties. The railway company had a right to construct its road upon the strip of land granted, but it has no right to occupy additional land without compensation or the payment of damages. The strip of land was granted before the road was constructed, and hence the consideration paid must be presumed to have been measured by the value of the land granted, and the anticipated damages, in the light of surrounding circumstances, and the knowledge of the parties at that time. It surely was not intended at that time that the road-bed should cover and rest upon land outside of the strip granted. Nor could it have been anticipated, that, in the construction of the road, land outside of the right of way would be occupied by the road-bed, or any portion of it. It would not be reasonable, therefore, to assume, that, in fixing the compensation, the parties included damages for such encroachment. Had the strip of land been taken by condemnation instead of by grant, the commission or jury in assessing the damages could not have included damages from such encroachment: *First*, Because they could not have assumed that the railway company would voluntarily so construct its road as to make it rest partially upon land outside of the right of way. To have assumed that, and to have assessed damages accordingly, would have been to assume that the railway company would commit a trespass, and to have assessed, in advance, damages resulting from such trespass. *Second*, Because they could not have known in advance that the result of the fill would be to cause the embankment to so spread as to encroach upon appellant's land and cause injury. Such an injury could not reasonably have been expected to result from the proper construction of the road. It will not be presumed that the parties included, in the price agreed upon at the time of and for the grant, any amount for injuries which could not properly have been considered by the commissioners and jury, had the right of way been taken by condemnation proceedings. The case is clearly distinguishable from the case of diminishing the water of a spring upon the grantor's land, or a case of laying drains which are necessary, in connection with culverts under the road, to the proper maintenance of the road. Here, the road-bed is made to rest, not only upon the land granted, but also partially upon land not granted, outside of the right of way, and for which there has been no compensation. If here the company may, by virtue of the grant of the right of way, without the payment of damages, so construct its road as to cover one or two acres of land outside of the grant, we know of no reason why other railway companies, under similar grants, may not procure a narrow strip of land as a

right of way, and, without further compensation or damages, so construct their road as to occupy a strip one, two, three, four, or more times as wide as the strip so granted.

Whatever the railway company may be able to show by an answer and evidence, we think that the complaint makes a case for damages, and that the demurrer thereto was improperly sustained.

For that error the judgment is reversed at appellee's costs.

Mitchell and Howk, JJ., do not concur in the foregoing opinion.

Throwing Earth on Adjoining Land, if unreasonable or unnecessary, gives rise to an action on the case for damages. *Felch v. Gilman* 22 Vt. 38.

ABBOTT

v.

NEW YORK & NEW ENGLAND R. CO.

(145 *Massachusetts*, 450.)

Eminent Domain. — Effect of Failure to furnish Plans. — Under the General Statutes (c. 63, § 45) providing that after a railroad "corporation has, by virtue of its charter, taken land or other property for the purpose of its road, it shall, before proceeding to construct the road, furnish a plan of the land to the owner," and that, if such plan is not so furnished, all the rights of the corporation to enter upon or use such land, except for making surveys, shall be suspended until it has delivered a plan, the failure to deliver a plan of land taken does not invalidate the taking; and a person whose land has been taken, cannot, after the road has been completed, and has been in use for nearly twenty years, object to such use on the ground that no plan has been furnished him.

Foreign Corporation. — Right of Eminent Domain passing to. — Although the power to take land by the right of eminent domain, which has been granted by the Legislature to a domestic railroad corporation, will not pass to a foreign corporation which by deed succeeds to the rights and powers of the domestic corporation without the assent of the Legislature, such assent may be gathered by implication from a series of Acts of the Legislature.

ON report. Judgment on verdict.

Actions of tort for trespass *quare clausum* and for obstructing alleged rights of way. Tried in the Superior Court before Aldrich, J.

A. J. Bartholomew and *David Manning* for plaintiffs.

Frank P. Goulding and *R. M. Saltonstall* for defendant.

HOLMES, J. — These are actions of tort in two counts, one in trespass, the other alleging the obstruction of a right of way. The alleged trespass consists of the use of a strip of land five rods wide by the defendant, for its road, across each of the plaintiffs' farms, and is admitted, unless the defendant has a valid location under the statutes of this State. The other count is of less importance, and will be referred to later.

Facts.

The defendant is the successor of the Boston, Hartford, & Erie Railroad Company (Stat. 1873, chap. 289), and the location principally relied on was a location five rods wide, made by that company on March 30, 1866. At that time that company was a Connecticut corporation only, and held no charter from this Commonwealth. It had taken a deed from the Southern Midland Railroad Company (whose projected road ran through the premises in question), purporting to convey the franchises and property of the latter, and certain Acts had been passed by the Legislature; but the plaintiffs contend that nothing had been done sufficient to confer the power to take land by eminent domain upon a foreign corporation, and that, if enough had been done, the Boston, Hartford, & Erie Railroad did not comply with conditions precedent attached to the exercise of that power.

The last objection may as well be disposed of at the outset. It appeared that plans of the land taken were prepared and furnished by the company to all land-owners who demanded them, and to no others. It did not appear that they were furnished to the owners of the plaintiffs' farms. It was argued for the plaintiffs that the burden was on the defendant to show that it had delivered plans to all owners of land taken, or at least to the owners of the plaintiffs' farms, whether demanded or not, and however long after the event, to save its use of their land from being deemed a trespass. But if the requirements of Gen. Stat. chap. 63, § 45, to "furnish" a plan means more than to deliver on demand, — as to which we express no opinion, — the plan, by the words of the section, is not to be furnished until after the corporation has taken the land, and the title of the corporation is not affected by failure to furnish it, but only the right to enter upon and use the land; which is suspended, except for making surveys, until the plan has been delivered. After the road is built the plan is no longer necessary or useful (*Charlestown Branch R. Co. v. Middlesex County*, 7 Met. 78, 83); and whatever might have been the merits of the plaintiffs' case, had they or their predecessors objected to the use of the land when the railroad was first laid out, and when the right to object could and would have been at once removed, it is too late for them to take it now, when the

Effect of failure to furnish plan.

road has been constructed and in operation for nearly twenty years. See *Dietrich v. Murdock*, 42 Mo. 279.

The question of the power of the Boston, Hartford, & Erie Railroad to make the location of 1866, is more difficult. The

• Power of
Boston, H., & E.
R. Co. to make
location.

Southern Midland road, which sold to the Boston, Hartford, & Erie, was the Midland Land Damage Company, with a changed name. Stat. 1863, chap. 1169. The Midland Land Damage Company was incorporated by Stat. 1861, chap. 155, and was made up of parties having claims for land damages against the Midland Railroad. It was given general railroad powers for the purpose of completing its road (§ 3), and was authorized to purchase the franchise and property of the Midland Railroad (§ 7); and, although it would seem not to have completed the purchase when Stat. 1862, chap. 126, was passed "to extend the time for locating and constructing the Midland Railroad," it appears to have done so before Stat. 1863, chap. 116. (In the second case, *Comstock v. Chamberlin*, the deed was put in dated June 14, 1862.) The Midland Railroad was incorporated by Stat. 1858, chap. 60, with general powers, including that of taking land by eminent domain, and also with special power to buy out the Boston & New York Central R.R. Co. By § 2, for the purpose of completing the said railroad, it was to have all the rights to which the last-named company was then entitled. It made the purchase Nov. 1, 1858. The Boston & New York Central was successor by consolidation to the powers of the Southbridge & Blackstone Railroad, incorporated by Stat. 1849, chap. 194. Stat. 1852, chap. 158; Stat. 1854, chap. 447; *Boston & P. R. Co. v. Midland R. Co.*, 1 Gray, 340. As such successor it had made a location three rods wide over the *locus* on Aug. 5, 1854, and, as this was assumed by the counsel for the plaintiffs to have been valid, subject to the objection just disposed of, we shall make the same assumption.

To repeat, the Boston, Hartford, & Erie road's grantor, under a changed name, was the purchaser of the franchise and rights of the Midland Railroad. The Midland Railroad was given general powers, and succeeded to all the powers of the Boston & New York Central, including the powers of the Southbridge & Blackstone. Assuming this three-rod-wide location of the Boston & New York Central to have been valid, we do not understand the counsel for the plaintiffs to deny that the grantor of the Boston, Hartford, & Erie could have made the five-rod location in 1866, if it had not conveyed away its franchise and property, and if the legislation then in force had applied to it. Stat. 1865, chap. 171; Gen. Stat. chap. 63, § 38; *Boston & P. R. Co. v. Midland R. Co.*, 1 Gray, 340. We do not under-

stand that the location of 1866 was without the limits prescribed by Stat. 1849, chap. 94, § 2.

Before examining the powers of the Boston, Hartford, & Erie Railroad more specifically, it will be well to advert to one or two general considerations. It was conceded by the plaintiffs' counsel that the powers to take land by eminent domain may be given to a foreign corporation. When the use for which land is taken is otherwise a public use, such as a railroad within the State granting the power, the use is not the less public because the owners are domiciled or incorporated out of the State. *In re Townsend*, 39 N. Y. 171, it was held that the power could be given to a company in another State in aid of a canal which also was in another State. And the proposition which we have laid down has never been doubted, so far as we know, by any court of last resort. *New York & E. R. Co. v. Young*, 33 Pa. 175; *State v. Sherman*, 22 Ohio St. 411, 434; *Southwestern R. Co. v. Southern & A. Tel. Co.*, 46 Ga. 43, 51; *Gilmer v. Lime Point*, 18 Cal. 229, 251, 255. See *Clark v. Barnard*, 108 U. S. 436, 452.

The decision of the court in *Burt v. Merchants Ins. Co.*, 106 Mass. 356, that the power could be conferred upon the United States Government, is criticised in *Kohl v. United States*, 91 U. S. 367, 373. See also *Darlington v. United States*, 82 Pa. 382; but the criticism, whatever may be thought of it, is not applicable to a case like the present.

It seems to us equally clear that a corporation, by consent of the Legislature, may take this power as *quasi* successor of another corporation to which it was originally granted; and it is not very material whether the legislative consent be regarded as authorizing a transfer of the old power, or, more strictly, as delegating a new power in the same terms as the old. See *State v. Sherman*, 22 Ohio St. 411, 428. The substance of the transaction is seen in cases of consolidation. *Boston & P. R. Co. v. Midland R. Co.*, *supra*. But there is nothing in reason to confine it to such cases. See *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 387; *Hall v. Sullivan R.R. Co.*, 21 Law Rep. 138, 141.

When the power is claimed under the form of a transfer, rather than of original grant, the legislative consent or grant may be inferred somewhat more readily than when the whole question is new, because the Legislature has already adjudicated the use to be public, and has granted a co-extensive power. See *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130, 402. For, while it is very plain that the power could not be transferred to, or exercised by, a purchaser from the original donee without such consent or grant in this Commonwealth (*Braslin v. Somerville H. R. Co.*, 145 Mass. 64, 67; *Commonwealth v. Smith*, 10 Allen,

448), the reasons which have led some courts and judges to doubt the need of such consent for the transfer of franchises show that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. *Shepley v. Atlantic & St. L. R. Co.*, 55 Me. 395, 407; *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9, 23; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452, 492; *Bickford v. Grand Junction R. Co.*, 1 Canada S. C. 696, 738. And this reasoning is of equal force whether the power to take land by eminent domain is properly called a franchise or not. *Coe v. Columbus, P. & I. R. Co.*, *supra*; *Chicago & W. I. R. Co. v. Dunbar*, 95 Ill. 571; s. c., 1 Am. & Eng. R.R. Cas. 214; *Pierce v. Emery*, 32 N. H. 484, 507, 511, 513.

Finally, the legislative consent may be expressed by way of ratification of what purports to be a transfer already executed. *Shaw v. Norfolk County R. Co.*, 5 Gray, 162, 180; s. c., 16 Gray, 407, 410; *Galveston R. Co. v. Cowdrey*, 78 U. S., 11 Wall. 459. And it may be gathered by implication from a series of Acts. *East Boston F. R. Co. v. Eastern R. Co.*, 13 Allen, 422.

At the time of the attempted transfer by the Southern Midland Railroad to the Boston, Hartford, & Erie, it had power, by Stat. 1861, chap. 155, § 7, to purchase and enjoy "all the rights and privileges" of the Midland Railroad Company, and to "use, enjoy, lease, sell, or convey the same to any other railroad company." And, inasmuch as from an early date it had been contemplated that the road would not only connect with roads outside the State, but that the corporations within and without the State might unite (Stat. 1850, chap. 268, § 9; Stat. 1852, chap. 158; 1 Gray, 358), it was not very extraordinary if the parties concerned assumed that the power to sell was not confined to domestic purchasers, especially as, in the next line, a purchase of cars jointly with connecting roads was allowed, showing that other corporations beside those of this State were in the mind of the Legislature.

It was hardly less natural that it should be assumed that the Legislature intended the purchaser to stand in the seller's shoes, and to have whatever powers the seller would have had if the sale had not been made.

The two Acts next to be cited, both passed before the location by the Boston, Hartford, & Erie, either show that this construction of Stat. 1861 is the true one (*Kohl v. United States*, 91 U. S. 374 (23 L. ed. 451), or else sufficiently express the consent of the Legislature. By Stat. 1865, chap. 171, "the time for locating and constructing the road of the Boston, Hartford, & Erie Railroad Company is hereby extended to" May 1, 1868. Stat. 1865, chap. 275, authorizes the same road to secure any

bonds issued under its Connecticut charter "by mortgage of its railways, property, rights, and franchises, or any part thereof, purchased or acquired by contract or arrangement with the Southern Midland Railroad Company . . . and situate or being . . . in this Commonwealth;" provided "that nothing in this Act contained shall in any way affect any claim or any remedies . . . which any person may have against said corporation, or any other railroad corporation . . . for damage caused to such person by the taking of the land, or any part thereof, included within the location of said corporations, or any or either of them, or by the laying out, making, and maintaining a railroad over the same." See also Stat. 1864, chap. 310.

After reading these Acts, we cannot doubt that the Legislature believed that the purchase by the Boston, Hartford, & Erie Railroad Company was valid, and intended that it should be, and that the purchasers should have the rights and power which the seller had previously possessed. The latter statute, in terms, saves claims against the purchaser for damage caused by the taking of land. The former gives it three years to locate and construct its road. The word "locate" is a term of art, in using which the Legislature can have had but one meaning. As was said by Chief Justice Shaw, about this very road: "The effect of the location is to bind the land described to that servitude." *Boston & P. R. Co. v. Midland R. Co.*, 1 Gray, 360. See also Gen. Stat. chap. 63, §§ 17, 18; *Hazen v. Boston & M. R. Co.*, 2 Gray, 574; *Charlestown Branch R. Co. v. Middlesex County*, 7 Met. 78. Moreover, the Legislature intended that the power to locate should be exercised by the Boston, Hartford, & Erie as *quasi* successor to its vendor. For the power is given in the form of an extension of the time previously allowed, referring, of course, to the statute giving the vendor until May 1, 1863, for the same purpose. Stat. 1863, chap. 116, § 2. See, further, Stat. 1862, chap. 126, "An Act to Extend the Time for Locating and Constructing the Midland Railroad," and Stat. 1861, chap. 44; 1860, chap. 44; 1859, chap. 23; 1858, chap. 13; 1857, chap. 32; 1856, chap. 33; 1855, chap. 115; 1854, chap. 447; 1851, chap. 134; 1849, chap. 194, § 2.

If there had been no consolidation, and the transfer had been direct from the Southbridge & Blackstone road to another Massachusetts corporation, we hardly can suppose that it would have been argued that the purchaser had not the same powers to take land and to complete the road that the Southbridge & Blackstone road would have had if its time had been extended by similar words before the sale. No doubt the expression of the Legislature's belief and intent might have been plainer. But the Acts of 1865 were passed before *Commonwealth v.*

Smith, 10 Allen, 448, was decided, and when the need of such expression was less accurately understood. If, however, the intent can be discovered, that is enough. And if the intent would be clear in the case which we have supposed, it is clear notwithstanding the facts that the grantor was formed by consolidation of different lines, and that the grantee was a Connecticut corporation. So far as the former fact is concerned, Stat. 1863, chap. 116, § 2, had already fixed a common time, by extension, for finishing all parts of the line. And, as to the latter, the statutes, by treating the Connecticut corporation as a successor to its vendor, impliedly but plainly subjected it to the conditions to which its vendor was subject, with respect to the power of taking lands.

We repeat that it is immaterial whether the purchaser, in strict theory, receives this power by transfer or by a new grant. For, if the grant to the purchaser is of a power limited and qualified as if it had been the same power conferred on the vendor, and taken by succession, the rights of land-owners are as fully protected as they were against the vendor, except so far as the fact that the purchaser is a foreign corporation necessarily makes a difference. In this case, that fact made no difference. The land-owners could have required security of the Boston, Hartford, & Erie, as well as of the South Midland Railroad; and they had the same means of compelling both security and payment in the one case as in the other, by stopping the use of their land. Gen. Stat. chap. 63, §§ 32, 34, 39. See *Drury v. Midland R. Co.*, 127 Mass. 571, 576.

We pass now to the Acts of the Legislature, subsequent to the location in question.

Stat. 1866, chap. 142, approved April 12, ratifies the mortgage made under Stat. 1865, chap. 275; provides for exchange of bonds secured by former mortgages, and for the recording of the mortgage.

Stat. 1866, chap. 266, approved May 26, about two months after the location, authorized the Boston, Hartford, & Erie to locate, construct, and maintain a road of about 600 feet to the Rhode Island line. There are no express provisions for compensation. It is assumed, of course, that the power is subject to the General Statutes.

Stat. 1866, chap. 278, § 5, authorizes the company to construct a railroad from its "chartered line" in Newton to its "chartered line" in Somerville.

Stat. 1867, chap. 75, incorporating the Roxbury Branch Railroad, authorizes the corporation to transfer its franchise property and all its rights to the Boston, Hartford, & Erie Railway Company; and other statutes give like powers to other corpora-

tions. Stat. 1867, chap. 133, § 5 ; chap. 170, § 14 ; Stat. 1868, chap. 35, § 8 ; 1869, chap. 406.

Stat. 1867, chap. 284, authorizes a loan from the State to the company, of \$3,000,000, for the purpose of aiding it to complete its railway from Boston to Fishkill, N. Y., with elaborate conditions.

By Stat. 1868, chap. 145, the company "heretofore created in the State of Connecticut . . . and acting within this Commonwealth, and recognized by Acts heretofore passed by its Legislature, is declared to be a corporation by that name, and vested with all the franchises, powers," etc., set forth in the General Laws ; "and the Acts of said company, in forming a union or connection with one or more railroad companies in the States of Rhode Island, Connecticut, and New York," to connect Boston with the Erie Railway Company in New York by a continuous line, are ratified. This seems to be intended to make the corporation a Massachusetts corporation (Stat. 1874, chap. 334), and to ratify unions with other roads. The Act then continues : "And the said Boston, Hartford, & Erie Railroad Company is hereby substituted in the place, and vested with all the franchises, rights, property, and powers, and is subject to all the duties and liabilities, of the Southern Midland Railroad Company," etc. This part of the statute sanctions, in terms, such a substitution as we have construed the earlier Acts to sanction by fair implication, and shows very plainly what was in everybody's mind from the beginning. If our construction is right, the Act is simply declaratory, and passed *ex majori cautela*.

Stat. 1869, chap. 450, increases the amount of State aid to the road to \$5,000,000 ; chap. 456 authorizes bonds and mortgages of lands and flats ; Stat. 1871, chap. 372, authorizes the foreclosure of a mortgage to the Commonwealth.

Stat. 1873, chap. 289, ratifies the proceedings of the bondholders of the Boston, Hartford, & Erie in organizing the defendant ; authorizes the new corporation to acquire all the rights, powers, and franchises of the former company, and to make a new mortgage of "its railroad property and franchises." We may remark here, with reference to a suggestion thrown out in the second case, that the defendant did not succeed to all the rights of the Boston, Hartford, & Erie, because its title was derived in part from foreclosure of a mortgage which was dated a few days before the location ; that if the suggestion could help either the plaintiffs in the first two cases or the defendant in the last two, and if it is not answered by this statute, it is by the fact that the mortgage covered subsequent locations (see 107 Mass. 3, note), and was ratified in that form, as we have seen, by Stat. 1866, chap. 142.

Finally Stat. 1873, chap. 289, ratifies the proceedings of the bondholders of the Boston, Hartford, & Erie in organizing the defendant ; authorizes the new corporation to acquire all the rights, powers, and franchises of the former company, and to make a new mortgage of "its railroad property and franchises." Stat. 1874, chap. 334, dissolves the Boston, Hartford, & Erie, saving all rights.

It thus appears that for twenty years the Commonwealth has constantly dealt with this corporation and its predecessors as having a good title to their road, and as having possessed the powers which they assumed to exercise. It has advanced a large sum of money on that assumption. For nearly twenty years before these actions were brought, the plaintiffs have acquiesced in the same view, while the road over their land has been in public operation. Meantime a mortgage was made, and the bonds sold in the market. We think that the courts should be slow to pronounce the Legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will, when, for so long a time, every thing has been conducted upon that footing. But we are satisfied, for the reasons which we have given, that the opinion of the Legislature was correct, and that the Boston, Hartford, & Erie R.R. Co. must be taken to have had the power and right to make its location of March 30, 1866.

It was admitted that if the five-rod-wide location of 1866 was valid, the claims of the plaintiffs to rights of way must be abandoned. The alleged adverse use had not continued for twenty years across the five rods. It would be too refined to say, and it was not argued, that the adverse use, if any, of a way across the three-rod location of 1854, begun before the widening, ripened into a right of way across the original three rods after the widening, and carried with it a necessary right of access across the strips on either side, which made the residue of the five rods. For, without admitting that there would have been any such right of access across the outside strips, had a right of way existed across the three rods before the widening, it is enough to say, that, as no right had been acquired at that time, the new location gave the railroad the right to the exclusive use of the land taken, and thus interrupted, for a moment at least, any adverse user, and made a fresh start necessary as to the whole. *Old Colony R. Co. v. Miller*, 125 Mass. 1, 5 ; *Smith v. New York & N. E. R. Co.*, 142 Mass. 21, 22 ; s. c., 25 Am. & Eng. R.R. Cas. 205.

It follows that the rulings of the court below that the locations were valid, and that the plaintiffs' evidence failed to show an adverse use of the crossings for a period of twenty years

before the obstruction of them by the defendant in 1885, were correct, and that, by the terms of the report, judgment must be entered on the verdict.

Judgment on verdict.

Failure to furnish Owner with Plan.— See *Brock v. Old Colony R. Co.*, *ante*, p. 96.

Rights of Foreign Corporations as to Eminent Domain.— See *Baltimore, etc., R. Co. v. Pittsburg, etc., R. Co.*, 10 Am. & Eng. R.R. Cas. 84; *Gray v. St. Louis, etc., R. Co.*, 22 Ib. 106.

In Nebraska.— Under sect. 8, art. 11, of the Nebraska Constitution, no foreign railroad corporation doing business in that State can exercise the right of eminent domain, or have the power to acquire right of way over real estate for depot or other uses, unless it is organized as a corporation under that State. This provision came before the Supreme Court of that State recently, in the case of *State v. Scott*, 38 N. W. Rep. 121, where the C. B. & Q. R. Co. and the L. W. Co. were joined as relators in an application for *mandamus* to compel the proper authorities to condemn and convey certain lots belonging to the State. The court held that the C. B. & Q. Co., being a foreign corporation, was not entitled to the relief, and, as a foreign corporation, is prohibited from acquiring right of way or real estate for depot or other uses. Therefore it cannot do indirectly what it is prohibited from doing directly.

Maxwell, J., said, "This section absolutely prohibits a railroad corporation organized under the laws of any other State from acquiring the right of way or real estate for depot or other uses until it has become a body corporate under the laws of this State. Stronger language could scarcely be used. This question has never before been presented to this court. In *Deitrichs v. Railroad Co.*, 13 Neb. 361, 13 N. W. Rep. 624, the question presented was, whether the lessor, or the lessee, was entitled to exercise the right of eminent domain; and it was held that the lessor, the owner of the road, was the party entitled to exercise the right. In that case, the Lincoln & North-western Railroad Company was the lessor, a corporation organized under the laws of this State. The question was again before the court in *Gottschalk v. Railroad Co.*, 14 Neb. 389, 15 N. W. Rep. 695; and the ruling in *Deitrichs v. Railroad Co.*, 13 Neb. 361, 13 N. W. Rep. 624, was adhered to. The undeviating rule adopted by this court is, not to discuss the constitutionality of a statute unless the question fairly arises in the case; and in no case heretofore presented to this court has the right of a foreign corporation doing business in this State to condemn right of way, or to acquire real estate for other uses, been presented. It is apparent, however, that such foreign corporation possesses no such rights. Our laws are liberal in promoting the organization of railroad companies and the construction of railways in the State. But such corporations must be under our own laws, the creatures of our statutes, and not of the laws of other States. It will be observed that in each application for the condemnation of the lots above described, the Chicago, Burlington, & Quincy, and the Lincoln & North-western Railroad Companies are joined as relators. That the Chicago, Burlington, & Quincy, being a foreign corporation, is debarred from the right to relief prayed for, was conceded by one of the attorneys for that corporation, on the argument. That matter may therefore be dismissed. But can it take as lessee of the Lincoln & North-western Railroad? The Constitution declares that it shall not acquire right of way or real estate for depot or other uses. If it cannot acquire these, it cannot take by lease or other means. It cannot do indirectly what it is absolutely prohibited from doing directly. To be entitled to relief, it must organize under the laws of the State."

In *Trester v. Missouri Pacific R. Co.*, 36 N. W. Rep. 502, it appeared that a railroad company organized as a corporation under the laws of another State, but doing business in Nebraska, sought to exercise the right of eminent domain in the condemnation of private property for the purpose of right of way, and filed with the county judge of the proper county a request for the appointment of appraisers to assess the damages to real estate resulting from the right of way thereon. Appraisers were appointed, and the damages assessed. From this assessment the land-owner appealed to the District Court. The railroad company appeared, and presented its petition and affidavit showing that it was a foreign corporation, and asking a removal of the cause to the Circuit Court of the United States. An order was made removing the cause as prayed. Subsequently the land-owner appeared in the District Court, and filed his motion for a re-instatement of the cause, which motion was overruled. *Held, first*, that, as the railroad company had no authority under the Constitution and laws of Nebraska to take or acquire real estate for the purpose of right of way, the whole proceeding was void, and that neither the county judge nor the District Court had any authority or jurisdiction to take any action in the matter; *second*, that the order of the District Court removing the cause to the Circuit Court of the United States was void, and conferred no jurisdiction on that court; *third*, that the District Court erred in not reinstating the cause, and dismissing it for want of jurisdiction.

CLARKE

v.

CHICAGO, KANSAS, & NEBRASKA R. CO.

(*Nebraska Supreme Court, March 14, 1888.*)

Eminent Domain. — Petition. — Proof of Incorporation. — Where a railway company, in its petition to condemn real estate for right of way, sets forth the necessary facts to show that it is a corporation duly organized under the laws of this State, and there is no denial of that fact, the petition will be *prima facie* sufficient to authorize the company to condemn real estate without proof of its incorporation.

Same. — Awards. — Estimates. — Where the principal ground of error is that the verdict is much less than it should have been, from the evidence before the jury, and it appears the jury based their verdict upon the testimony of the witnesses whose estimates were the lowest, instead of those whose estimates were the highest, the verdict, ordinarily, will not be set aside.

ERROR to District Court, Thayer County; Morris, Judge.

This was a proceeding instituted to condemn certain lands belonging to H. T. Clarke for a right of way for the Chicago, Kansas, & Nebraska Railroad Company. To reverse the judgment of the District Court on the assessment of damages, the plaintiff brings error.

Pound & Burr for plaintiff in error.

Manford Savage for defendant in error.

MAXWELL, J. — The defendant located its line of railway across three-quarter sections of the plaintiff's land, and regular proceedings were instituted to condemn such right of way, and an award made by the commissioners, and filed with the county judge. An appeal was then taken to the District Court, and on the trial the following verdicts were rendered: —

Facts.

"We, the jury in this case, being duly impanelled and sworn, do find and say that the plaintiff recover of the defendant, and assess his damages on the north-east quarter of section 8, town 2, range 1, west of 6 P.M., at the sum of \$145.79 for the actual amount of land taken, and the further sum of \$115.00 damages to the remaining part of said land ; and generally we find for the plaintiff in the sum of \$260.79.

"W. H. JENNINGS, *Foreman*."

"We, the jury in this case, being duly impanelled and sworn, do find and say that the plaintiff recover of the defendant, and assess his damages on the south half of section nine (9), town 2, range 1, west of 6 P.M., at the sum of \$149.52 for the actual amount of land taken, and the further sum of \$190.00 damages to the remaining part of said land ; and generally we find for the plaintiff in the sum of \$339.52.

"W. H. JENNINGS, *Foreman*."

"We, the jury in this case, being duly empanelled and sworn, do find and say that the plaintiff recover of the defendant, and assess his damages on the north-west quarter of section 15, town 2, range 1 west, at the sum of \$199.36 for the actual amount of said land taken, and the further sum of \$291.42 damages to the remaining part of said land ; and generally we find for the plaintiff in the sum of \$490.78.

"W. H. JENNINGS, *Foreman*."

A motion for a new trial having been filed and overruled, and judgment entered on the verdicts, the plaintiff prosecutes error to this court. The first error assigned is, that there is an entire want of testimony to show that the defendant is a corporation organized under the laws of this State. In the petition filed with the county judge for the condemnation of the right of way in controversy, it is alleged that said defendant "is a corporation duly incorporated and organized under and by virtue of the laws of the State of Nebraska, and under and by virtue of its charter and incorporation as aforesaid is authorized by the laws of the State of Nebraska to construct, operate, and maintain a line of railroad into and through said county of Thayer." Then follows a statement of

Petition.
Proof of in-
corporation.

the necessary facts to authorize the county judge to appoint commissioners to condemn said right of way. None of these facts were denied, either before the county judge or in the District Court. It is therefore unnecessary for the corporation to introduce testimony to prove that it was duly incorporated under the laws of this State. In a number of cases this court has held, that, where other matters are involved than the amount of damage sustained, such matters must be pleaded. *Railroad v. Hayes*, 13 Neb. 489; s. c., 10 Am. & Eng. R.R. Cas. 217; *Gerrard v. Railroad Co.*, 14 Neb. 270; s. c., 10 Am. & Eng. R.R. Cas. 506. Where, therefore, no issue is taken up, or any matter aside from the question of damages, by pleading facts, and the petition shows on its face the right of the corporation to condemn, the simple question presented is the amount of damages to be awarded. The first assignment, therefore, is not well taken.

2. The second ground of error is, that the verdicts are less than the testimony would warrant. It must be confessed that the amounts awarded are much less than the jury would have been justified from the evidence in returning. But there was ample testimony before the jury to justify these verdicts, and the fact that they have adopted the lowest instead of the highest estimate will not ordinarily justify an appellate court in setting the verdicts aside. The question of the value of real estate or damages sustained by a land-owner from a right of way condemned across his land is peculiarly of a local nature, proper to be determined by a jury of the county where the land is situated; the verdict being based upon the testimony of witnesses acquainted with the land and its value, and capable of making a fair estimate of the damages sustained. Such a jury, thus advised, certainly possess means of knowledge not presented to this court; and their verdict, based upon the testimony generally, will be sustained. There is no error in the record, therefore, and the judgment is affirmed.

The other judges concur.

Conclusiveness of Jury Verdict. — When Finding will be set aside. — The finding of a jury of inquest in condemnation proceedings is not conclusive as to the measure of damages; and where it appears that the amount awarded by the jury was much smaller than any testimony in the case warranted, and that they entirely disregarded proper elements of damages, the finding will be set aside. *Cedar Rapids & I. R. Co. v. Weiden* (Mich.), 38 N. W. Rep. 298.

See *New Orleans & G. R. Co. v. Frank*, and note, 30 Am. & Eng. R.R. Cas. 275-276.

Opinion expressed by the Court in instructing the Jury as to the Amount of Damages Recoverable. — In a case for damages for land taken for railroad purposes, the testimony was conflicting, and estimated the damages from about \$350 up to \$750. The court instructed the jury that the damages could

not well be less than the \$350 or more than \$750, "though it is merely an opinion of our own, and not intended to sway you." *Held*, that the opinion of the court was properly qualified, and was not error. *Cresson, etc., R. Co. v. Aunsman*, 11 Atlantic Rep. 561.

WICHITA & WESTERN R. Co.

v.

KUHN.

(*Kansas Supreme Court, March 10, 1888.*)

Eminent Domain. — Opinion of Witness as to Damages. — In condemnation proceedings, a witness, without testifying either as to specific values or as to specific facts, may not estimate damages by "taking into consideration all incidental loss, inconvenience, and damages, present and prospective, which may reasonably be expected or shown to exist from the maintenance of said railroad track to be continued permanently."

ERROR to District Court, Reno County; L. Houk, Judge.

Application for rehearing. For former opinion, see note.

George R. Peck, A. A. Hurd, and Houston & Bentley for plaintiff in error.

John R. Parsons for defendant in error.

PER CURIAM. — On Dec. 10, 1887, this case was decided, and the judgment of the court below was to some extent modified. Immediately thereafter the plaintiff in error, defendant below, moved for a rehearing, upon the ground that the court below erred in the admission of evidence, and that this court misconstrued such evidence. After a re-examination of the case we are inclined to think that the plaintiff in error is correct. Among the evidence complained of is the following: The plaintiff below introduced the deposition of Rufus J. Razey, which deposition contains the following question and answer; to wit, "*Question.* How much less, in your opinion, is this farm worth after the railroad company had established their track through it, irrespective of any benefits from any improvements proposed by the railroad company to be derived from said track, taking into consideration all incidental loss, inconveniences, and damage, present and prospective, which may be reasonably expected or shown to exist from the maintaining of said railroad track, to be continued permanently? *Answer.* About \$2,100." This question and answer the court below permitted to be introduced, over the ob-

jection and the exception of the defendant below. The court below certainly should not have permitted this evidence to be introduced. It involved substantially every thing that the jury were called upon to determine, and left nothing for the jury to decide. It invaded the province of the jury. It really amounted to letting the witness himself determine by his own opinion what the plaintiff's damages were, and the amount which the plaintiff should recover in the action. It had no reference particularly to the market value of the land either before or after the right of way was taken, nor any reference to any specific fact which might tend to show what such market value was, or to increase or diminish the same; but it involved all these things and a great deal more. Upon the questions involved in this case we would refer generally to the following authorities: 3 Suth. Dam. c. 16; Railroad Co. v. Moore, 5 Am. & Eng. R.R. Cas. 352, note, and cases there cited; McReynolds v. Railway Co., 14 Am. & Eng. R.R. Cas. 175, note, and cases there cited; Neilson v. Railway Co., 14 Am. & Eng. R.R. Cas. 244, note, and cases there cited; Railroad Co. v. Foreman, 20 Am. & Eng. R.R. Cas. 225, note, and cases there cited. We shall also refer to some other authorities. Where the whole of the owner's land is taken in condemnation proceedings, the measure of his damages is the actual value of his land; but where only a portion of his land is taken, as in this case, the measure of his damages is generally the difference in the value of the land before it was taken and afterward. This rule, though generally correct, is not always so in Kansas, for in Kansas, where the land of another is taken by a corporation for a right of way, the damages recoverable under sect. 4 of art. 12 of the Constitution can never be less than the actual value of the property taken. That section reads as follows: "Section 4. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation." The above question is objectionable for several reasons. It has no particular reference to values or to specific facts, but in effect calls for an opinion of the witness as to what the final determination upon all the facts should be. It is simply permitting the witness to answer what only the jury can properly answer. This cannot be allowed. A witness should not even be allowed to state his opinion with reference to the damages to be recovered. Roberts v. Commissioners, 21 Kan. 248, 253; Water Co. v. Knapp, 33 Kan. 753; Railroad Co. v. Ball, 5 Ohio St. 568; Railroad Co. v. Burkett, 42 Ala. 83; Railroad v. Senn, 73 Ga. 705, 27 Am. & Eng. R.R. Cas. 304; Railroad Co. v. Whalen, 11 Neb. 585, 5 Am. & Eng. R.R. Cas. 364. Also

by this question all benefits to the plaintiff's land are to be excluded from the witness's computation or estimate of the amount of damages to be recovered. Whether the jury, in rendering their verdict, should exclude all benefits or not, it is not necessary to consider in this case. The weight of authority, however, would seem to be, under constitutions and statutes similar to ours, that all benefits should be excluded in estimating the value of the land actually taken, but that all proper benefits might be considered in estimating the damages to the remainder of the land which is not taken. Some of the decisions in Kansas, however, would seem to favor the exclusion of all benefits in cases like this. *Railroad Co. v. Orr*, 8 Kan. 420; *Hunt v. Smith*, 9 Kan. 137; *Reisner v. Railroad Co.*, 27 Kan. 382. But passing from this question, without deciding it, we come to the further question, whether a witness, without testifying either as to specific values or as to specific facts, may estimate damages by "taking into consideration all incidental loss, inconveniences, and damages, present and prospective, which may reasonably be expected or shown to exist from the maintaining of said railroad track to be continued permanently." No rule of law will sustain such a question as this. In the first place, a witness is never allowed to testify in the lump with reference to "all incidental losses, inconveniences, and damages, present and prospective," to occur in all future time, or that has occurred, or may occur in any particular time; as before stated, a witness is not even allowed to testify as to damages; and generally even juries are not allowed to assess damages for "all incidental losses, inconveniences, and damages, present and prospective," which have occurred or which may occur. See authorities above cited. Generally the damages assessed must be only such as are direct, special, and proximate, and not such as are speculative, remote, or problematical, or such as affect the public in general, and not the plaintiff in particular. See authorities above cited, and *Railroad Co. v. Andrews*, 30 Kan. 594, and cases there cited; *Railroad Co. v. Kregelo*, 32 Kan. 609; *Village of Hyde Park v. Dunham*, 85 Ill. 570. The judgment of this court heretofore rendered will be set aside, and the judgment of the court below will be reversed, and cause remanded for a new trial.

Opinion of Witness as to Damage. — On the decision of the principal case on the original hearing, which is now reversed, the court said, "Plaintiff in error charges that the court erred in permitting witnesses to testify to the measure of damages to the plaintiff's land. R. J. Razey was permitted to answer the following question, asked by the defendant: '*Question.* How much less, in your opinion, is this farm worth after the railroad company had established their track through it, irrespective of any benefits from any improvements proposed by the railroad company to be derived from said track, taking into

consideration all incidental loss, inconveniences, and damages, present and prospective, which may reasonably be expected or shown to exist from the maintaining of said railroad track, to be continued permanently? *Answer.* About \$2,100.' Counsel contends that the measure of damages is the difference in value of the land taken at the time it is condemned, and its value immediately thereafter; that is, how much less it was worth thereafter. We think this question comes fairly under that rule. In other words, instead of asking the witness the value before and after, the question was, how much less was the farm worth after than before. To answer this, the witness must determine in his mind what it was worth before, and how much it was worth afterwards, and the difference would be his answer. The witness was shown to have been well acquainted with the land before and after the construction of the railroad through it, and of the value of the farm and the land taken. *Railway Co. v. Allen*, 24 Kan. 33; *Railway Co. v. Paul*, 28 Kan. 816." And see also *Central R. Co. v. Senn*, 27 Am. & Eng. R.R. Cas. 304; *Houston, etc., R. Co. v. Burke*, 9 Ib. 59.

Evidence of Effect produced upon other Farms by their being cut by Railroads is Inadmissible.—In a proceeding by a railroad corporation to condemn right of way through a farm, evidence for plaintiff as to the effect produced upon the selling-value of other farms in the same county by their being cut by railroads, as shown by actual sales, is not admissible. *Kiernan v. Chicago, etc., R. Co. (Ill.)*, 14 N. E. Rep. 18.

Prominence to be given to Evidence derived from Personal Examination.—The jury, in a proceeding to condemn land, were to assess both the value of land taken, and the damage to land not taken, and lawfully view the premises in person, and the result of such view was competent evidence for the jury to consider. *Held*, an instruction that, if they believed, from all the evidence, that they had from personal examination of the premises arrived at a more accurate judgment and determination of the value and damage than was shown by the evidence taken in open court, they might rightfully fix the value and damage at the amount so approved by their judgment so formed from personal examination of the premises, even though their finding may differ from the amount testified to and from the weight of the testimony, does not give undue prominence to the evidence derived from such personal examination. *Kiernan v. Chicago, etc., R. Co. (Ill.)*, 14 N. E. Rep. 18.

FORNEY

v.

FREMONT, ELKHORN, & MISSOURI VALLEY R. CO.

(*Nebraska Supreme Court, Feb. 12, 1888.*)

Eminent Domain.—What may be Taken.—The right of eminent domain gives the control of private property for public uses, and for public uses only; and in case of a railway this right is restricted to "so much real estate as may be necessary for the location, construction, and convenient use of its road."

Compensation.—When Building passes with Land.—Where real estate is necessary for the location, construction, and convenient use of a railway,

and there is a building on such real estate, and the commissioners, in making the award of damages in condemnation proceedings, find the value of the real estate without the building, and an additional sum with the building, and give the owner an option to take the value of the real estate and the building, or the value of the real estate with the right to remove the building, the owner cannot, after receiving compensation in full for the land and the building, sue the company for the value of the building, upon the ground that it had misappropriated it by selling it to other parties who had removed it from the right of way.

Condemnation of Building situated on the Right of Way. — The right of a railway company to condemn buildings situated on real estate necessary for its use is an incident of such right to condemn, and the owner must be paid full value for the land and the building.

ERROR to District Court, Dodge County ; Marshall, Judge.

Action by George H. Forney to recover the value of a barn located on the right of way of the defendant, the Fremont, Elkhorn, & Missouri Valley Railroad Company, as condemned, across the plaintiff's property. Judgment for defendant, and plaintiff brings error.

Frick & Dolezal and *C. Hollenbeck* for plaintiff in error.

J. B. Hawley for defendant in error.

MAXWELL, J. — The plaintiff, in the spring of 1886, was the owner in fee of fractional lots 11 and 12 in Sampson's addition to the city of Fremont. Some time in May, 1886, the defendant, being desirous of extending its rail- Facts. road over said lots, applied to the county judge of Dodge County for the appointment of commissioners to assess the damages that plaintiff would sustain by reason of the appropriation of part of said lots as its right of way. There was standing upon said lots one frame barn, which, as appears from the pleadings and evidence, stood partly on the right of way condemned by defendant, and partly on the lands not so condemned of plaintiff. Shortly after the condemnation proceedings the defendant moved the barn in question from the premises, and afterwards sold the same ; one portion of said barn being used as a dwelling-house, and the other part used as a stable in a distant part of the city. The award of the commissioners to appraise the property is as follows : —

“ *State of Nebraska, Dodge County, to the county judge of said county:* We, John Ramberg, John Hayman, George C. Laird, E. C. Burns, W. D. Thomas, and A. M. Weich, the persons appointed commissioners by you to assess damages done to the owners of real estate in said county whose lands shall be appropriated by the Fremont, Elkhorn, & Missouri Valley Railroad Company, in certain cases provided by law, report : The board proceeded to view the following-described real estate, to wit, and

estimated the damages as follows: Fraction lots 11 and 12 in Sampson's addition to the city of Fremont, Nebraska, the sum of one thousand dollars, reserving the right and privilege of owner to remove all improvements; \$1,325 without privilege of removing improvements. GEORGE FORNEY (owner)."

There is also a receipt of Mr. Forney, which is as follows:

"FREMONT, ELKHORN, & MISSOURI VALLEY RAILROAD COMPANY,
RIGHT OF WAY.

"FREMONT, DODGE COUNTY, NEBRASKA, May 10, 1886.

"Received of J. J. Barge, county judge of said county, the sum of one thousand three hundred and twenty-five dollars, without privilege of removing the improvements on the right of way on following real estate: Fraction lots 11 and 12 Sampson's addition to the city of Fremont, Nebraska, for the right of way of the Fremont, Elkhorn, & Missouri Valley Railroad Company.

"GEORGE H. FORNEY."

This action is brought by the plaintiff to recover the value of the barn, because it was not used for the purpose for which it was condemned, viz., the construction or use of the railway. On the trial of the cause the jury returned a verdict in favor of the defendant, and, a motion for a new trial having been overruled, judgment was entered on the verdict.

Sect. 81, c. 16, Comp. St., provides that "such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may take, hold, and appropriate so much real estate as may be necessary for the location, construction, and convenient use of its road, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, switches, side tracks, turn-tables, and water stations; all materials for the construction and repair of said road and its appurtenances, and a right of way over adjacent lands sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts, and the right of making proper drains: provided, that the lands held, taken, and appropriated otherwise than by consent of the owner shall not exceed two hundred feet in width, except for wood and water stations and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth: provided, further, that no appropriation of private property for the use of any corporation, provided for in this subdivision, shall be made until full compensation therefor be first made or secured to the

owners thereof." Eminent domain is the power to take private property for public use. 1 Bouv. Law Dict. 588. It is the power which remains in the government to resume the possession of property, upon making just compensation therefor, whenever the public interest requires it. This right of resumption may be exercised, when required for the public good, in the construction of a railroad, public road, canal, or other like work. The right of eminent domain, however, does not permit the sovereign power to take the property of one citizen and transfer it to another, even for full compensation. *Beekman v. Railroad Co.*, 3 Paige, 73. In other words, the right of eminent domain gives to the Legislature the control of private property for public uses, and for public uses only. 2 Kent, Comm. 339, and cases cited. This being the rule, the property must be used for the purpose which justified its taking; otherwise it would be a fraud on the owner and an abuse of power, and the authority, being in derogation of private right, is to be strictly construed. Acting upon these rules, the courts uniformly hold, that, where the right of way is secured by condemnation proceedings under the statute, the title of the stone, sand, and the like remains in the owner, and can be used by the corporation owning the railroad only for purposes connected with its construction and use. It is sought in this case to apply the same rules to buildings upon the right of way which the company was compelled to purchase in order to remove the same from the right of way to construct the road. A corporation would have no right to condemn private property for public use unless there was an absolute necessity for such condemnation, the language of the statute being, "may take, hold, and appropriate so much real estate as may be necessary for the location, construction, and convenient use of its road." A company, therefore, is limited to such real estate as may be necessary for the purposes named. *Vermilya v. Railway Co.*, 23 Am. and Eng. R.R. Cas. 108, and cases cited. Where, however, it is necessary to condemn real estate for public use, there being buildings on such property, the buildings thereon are a mere incident to the right to condemn real estate; that is, that, as the public necessity requires the real estate for public use, it must take it incumbered with the buildings thereon, and the owner must be paid full compensation for the land and the buildings before he can be divested of his right to the same. And the corporation cannot apply the buildings to any purpose inconsistent with their condemnation. Where, however, it is necessary to remove the buildings in order to clear the right of way for the construction of a railroad, and this fact was well known to the corporation and

Eminent domain. What is taken in condemnation proceedings.

Buildings on land condemned.

to the owner of the buildings when the condemnation proceedings took place, and the owner was allowed full compensation for such buildings, the fact that the buildings were sold by the corporation for the purpose of clearing the right of way, and having such building removed from the same, will not entitle the owner to claim them as his own. The reason is, such removal was in the contemplation of the parties when the condemnation took place, and was necessary to the construction of the public improvement, and it can make no difference to the owner what disposition is made the buildings. The case differs in that regard from that where stone or sand is removed from the right of way, because the removal of the same was not within the contemplation of the parties, nor necessary for the construction and convenient use of the road. In the case under consideration the plaintiff had an option, \$1,000 with the right to remove the barn, and \$1,325 if the railway company was required to retain the barn. No appeal was taken from the award, so far as we are aware, and its validity cannot now be questioned. He has received payment in full, apparently, and there is no justice in permitting him still to claim the property.

It is evident that the judgment of the court below is right, and it is affirmed. Judgment affirmed.

The other judges concur.

Condemnation of Land with Buildings upon it.—See *Chicago, etc., R. Co. v. Knuffke*, and note, 30 Am. & Eng. R.R. Cas. 387-390.

Railroad can take only so much Land as is Necessary.—*Chicago, etc., R. Co. v. Dunbar*, 5 Am. & Eng. Cas. 253; note to *Prather v. Western Union Telegraph Co.*, 14 Ib. 20; note, 14 Ib. 43; *State v. Hudson Terminal R. Co.*, and note, 20 Ib. 294-298; *Bowman v. Venice, etc., R. Co.*, 14 Ib. 338; *Platt v. Pennsylvania R. Co.*, 22 Ib. 129; *Smith v. Chicago, etc., R. Co.*, 14 Ib. 384; *Tracy v. Elizabethtown R. Co.*, 14 Ib. 407; *United States v. Oregon R. & N. R. Co.*, 14 Ib. 23; *Louisville & N. R. Co. v. Quinn*, 22 Ib. 111; *Carolina Central R. Co. v. McCaskill*, 25 Ib. 83. *In re Application, etc., of Staten Island, etc., R. Co.*, 27 Ib. 348.

What Land Adjacent to a Dwelling may be taken.—The prohibitive words of the Pennsylvania Act of Feb. 19, 1849, sect. 10, forbidding railway companies from "passing through . . . any dwelling-house in the occupancy of the owner or the owners thereof, without his, her, or their consent," embrace some of the curtilage; but only so much as is necessary to the enjoyment of the house, and not to that which is desirable or convenient, or which depend alone upon the will of the owner.

The route of a railroad was located through ground adjoining, but not within the same enclosure as, a dwelling-house. The house was a hundred feet from the railroad at its nearest point; the route of the carriage-way from the dwelling-house was unchanged; access to a spring-house, separated from the house by the railroad, was not interfered with; no outbuilding was taken; the barn was fifty feet from the track, and the railroad was not between the house and the barn. *Held*, that upon the above facts, a court below was not in error in refusing to grant an injunction, and restrain the construction of the railroad. *Damon v. Baltimore, etc., R. Co. (Pa.)*, 13 Atlantic Rep. 217.

Railroad condemning Lots abutting on Street takes to Centre of Street. — Where, in condemnation proceedings by a railway company, a village lot is appropriated under the description thereof as designated by a survey and plat of the same, the company takes presumptively to the centre of the street. And, subject to the public easement and the control of the proper public authorities, the company acquires the same interest in that portion of the lot so taken lying in the street as to the remainder thereof, and may apply it to the same uses. *Witt v. St. Paul & N. P. R. Co. (Minn.)*, 35 N. W. Rep. 862.

PACIFIC COAST R. CO.

v.

PORTER.

(*California Supreme Court, Dec. 2, 1887.*)

Eminent Domain. — Benefits accruing to Residue of Land. — Under the Constitution of California (art. 1, sect. 14), providing that no right of way shall be appropriated to the use of any corporation, not municipal, until compensation is made, irrespective of any benefits from the proposed improvements, the benefit supposed to result to the rest of a piece of land by the taking of a portion of it for the railroad right of way cannot be considered in a suit to determine the compensation to be paid to the owner.

Procedure. — Verdict. — Code Civil Proc. Cal. § 1249, provides that compensation and damages on condemnation proceedings shall be assessed as of the date of the issuing of the summons. Sect. 1243 provides that the proceedings "must be commenced by filing a complaint and issuing a summons thereon." The verdict of a jury in a condemnation suit assessed the damages as to "the *present* value of the strip of land." *Held*, that the verdict was to be construed with reference to the issues in the pleadings, which related to the time of the beginning of the proceeding in this case identical with the summons.

COMMISSIONERS' decision. In bank.

Appeal from Superior Court, San Luis Obispo County; James G. Maguire, Judge.

The Pacific Coast Railway Company, plaintiff, sued Uriah and Fanny R. Porter, defendants, to condemn a right of way. Judgment for defendants, and plaintiff appealed.

R. B. Treat for appellant.

C. W. Goodchild and *W. H. Spencer* for respondents.

HAYNE, C. — This was a proceeding to condemn a strip of the defendants' land, for the purposes of the plaintiff's road. The cause was tried by a jury, who rendered a verdict, and judgment was entered thereon, and on the addi-

Facts.

tional findings of the court condemning the said land, and decreeing that the plaintiff pay to the defendants Uriah and Fanny Porter, (1) the sum of \$75, adjudged to be the value of the land taken; (2) the sum of \$800, as damages to the remainder of the land; and (3) the sum of \$275, cost of fencing and cattle-guards, which, however, the plaintiff was given the option to build at its own expense. The plaintiff appeals from that part of the judgment directing payment to the said defendants.

1. It is argued for the appellant, that evidence should have been admitted of the benefits accruing to the remaining land, and that such benefits should have been deducted from the amount of damage assessed. But the constitution expressly provides that "no right of way shall be appropriated to the use of any corporation, *other than municipal*, until full compensation therefor be first made in money, or ascertained and paid into court for the owner *irrespective of any benefit* from any improvement proposed by such corporation." Article I, § 14.

Under this provision the benefits supposed to result to the remainder of the land cannot be considered. An exception to this rule is provided when the corporation for whose use property is taken is a "municipal corporation." The case of *Butte Co. v. Boydston*, 64 Cal. 110, and *Tehama Co. v. Bryan*, 68 Cal. 57, fall within this exception. For, as is well said by respondent's council, the word "municipal," as used in the provision, refers to such corporations as are for public government, and therefore includes counties. Unless the cases mentioned proceed upon this ground, we do not see how they can be sustained.

2. It is claimed that, under section 1249, Code Civil Proc., the compensation and damages should have been assessed at the date of the issuing of the summons; and that the verdict of the jury was as to "the *present* value of the strip of land," etc. This seems to verge close to those criticisms upon the form of the verdict which are to be made in time to admit of correction. *Algier v. The Maria*, 14 Cal. 170, 171. But without reference to this rule, it seems to us that the verdict did relate to the time of the issuance of the summons. The verdict is to be construed with reference to the issues made by the pleadings; and the issues made by the pleadings ordinarily relate to the time of the commencement of the action or proceedings, which in this kind of case is identical with the issuance of the summons. Section 1243 of the Code provides that the proceedings "must be commenced by filing a complaint *and issuing a summons thereon*." Under this language, the proceedings were not commenced until the summons was issued. Compare *Flandreau v. White*, 18 Cal. 639; *Green v. Water Co.*, 10 Cal.

Procedure.
Verdict.

Compensation
accruing to
residue of land.

374 In the case before us, the complaint was filed and the summons issued on the same day.

We therefore advise that the part of the judgment appealed from be affirmed.

We concur : Belcher, C. C. ; Foote, C.

BY THE COURT. — For the reasons given in the foregoing opinion, that part of the judgment appealed from is affirmed.

Consideration of Benefits resulting to Land-Owner in making Compensation. — See *Chicago, etc., R. Co. v. Blake*, 24 Am. & Eng. Cas. 288; *Washburne v. Milwaukee, etc., R. Co.*, 20 Ib. 225; *Grafton, etc., R. Co. v. Foreman*, and note, 20 Ib. 215-225; *Smith v. Coombs*, 20 Ib. 209; *St. Louis R. Co. v. Anderson*, 17 Ib. 97; *MacReynolds v. Burlington, etc., R. Co.*, 14 Ib. 172; *Gulf, etc., R. Co. v. Fuller*, 22 Ib. 154; *Platt v. Pennsylvania Co.*, 22 Ib. 129, note; *the Union R., etc., Co. v. Moore*, 5 Ib. 356; *Pittsburg, etc., R. Co. v. Robinson*, 1 Ib. 468; *Fremont, etc., R. Co. v. Whalen*, 5 Ib. 364; *St. Louis, etc., R. Co. v. Kirby*, 10 Ib. 214; *Morin v. St. Paul, etc., R. Co.*, 10 Ib. 223; *Britton v. Des Moines, etc., R. Co.*, 10 Ib. 412.

Item reported for Benefits in Commissioner's Report need not show in what Benefits consist. — Where commissioners have met and assessed the damages and benefits accruing to a piece of land from the construction of a railroad across it, it will be presumed that they followed the correct rule in so doing, and their report will not be set aside because the item reported for benefits does not show in what the benefits assessed consist, where no objection was made when the report was submitted. *Wilmington & W. R. Co. v. Smith (N. Car.)*, 5 S. East. Rep. 237.

LITTLE ROCK JUNCTION R. Co.

v.

WOODRUFF.

(49 *Arkansas*, 381.)

Eminent Domain.—Owner entitled to Market Value. — The owner of land taken by a railroad for a bridge site is entitled to receive its market-value at the time of its appropriation. By market-value is meant the price that the owner of the land could obtain for it after taking reasonable and ample time to effect a sale.

Same. — Market Value how ascertained. — The market-value of property taken for railroad purposes is ordinarily to be proved by the opinion of witnesses; and in support of their estimates they may describe the property, giving its location, advantages, and surroundings.

Range of Testimony to show Market Value. — In ascertaining the value of land taken for railroad purposes, the latitude which should be allowed the parties in producing testimony of facts to support estimates made by witnesses is a matter largely in the discretion of the presiding judge. The owner should be allowed to prove every fact which he would be naturally supposed to adduce if he were attempting a private sale. The opposing counsel should be allowed to make every inquiry which one about to buy the property would feel it to his interest to make.

Same. — Value of Land as a Bridge Site. — In a proceeding to condemn a site for a railroad-bridge, evidence to show that the land required for that purpose possesses special advantages as a bridge site is admissible as affecting the question of its market-value.

Same. — Instructions. — In a proceeding to condemn a site for a railroad-bridge, the plaintiff asked the following instructions: "That, in considering the question of the value of the property, the jury will not award the owner an amount for damages based upon what the railroad company might have saved by taking the land, but will only allow as damages the amount which the owner might have been damaged by the loss of his property, and, in their estimate of loss, they may consider all the uses to which a *person* could have devoted the property. Persons or corporations are sometimes authorized to build railroads, and take property for that purpose, and, in fixing the value of that property, the rule is, not how much the land is worth to the railroad company, or how much the railroad company will save by adopting a route over the land in controversy, but what is the value of the land to the owner, considering all the uses to which it might be devoted by him." *Held*, that these instructions were properly refused.

New Trial for Excessive Damages. — In proceedings to condemn land for railroad purposes the sole issue was as to the value of the land, and there was evidence to support the verdict of the jury. *Held*, that it was peculiarly within the province of the jury to find the value of the land, and this court, although not entirely satisfied with the evidence which supports their verdict, will not disturb it as being excessive.

APPEAL from Circuit Court, Lonoke County; F. T. Vaughan, Judge.

John McClure for appellant.

Collins & Balch and *U. M. & G. B. Rose* for appellees.

McCAIN, Special Judge. — This is a proceeding to condemn a site for the landing and approaches of a railroad bridge across the Arkansas River at Little Rock. The land sought

Facts. to be condemned embraces what is known in the vicinity as the "Point of Rocks." This is a sort of promontory that makes out into the river, and seems to have been somewhat inviting as a bridge-site. The only issue in the court below was as to the value of the property. The estimates of the witnesses ran all the way from \$1,500 to \$50,000. The jury fixed the value at \$20,000. The railroad company appealed. It is contended that the court below erred in admitting incompetent testimony, in refusing certain instructions asked by appellant, in giving an instruction for appellees against the objection of appellant, and also in refusing to set aside the verdict as being excessive and contrary to the evidence. The Constitution of this State declares "all railroads to be public highways." Article 17, § 1. For

The power
of eminent
domain.

the construction of these highways "the State's ancient right of eminent domain is conceded." Article 2, § 23. The owner of the property taken under this right is entitled to "full compensation." Article 12, § 9. The title to land is always held upon the implied condi-

tion that it will be surrendered to the government when the public necessities demand, and when full compensation has been tendered. The taking of property under this power has very properly been called a "compulsory purchase." In this regard it bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by the twenty-eighth section of *Magna Charta*. Under that prerogative the king was allowed to take certain personal property of the subject when his convenience and necessity demanded, but the same was not to be taken without paying the fair value to the owner. 1 Bl. Comm. 287.

In taking property under this power of eminent domain for railroad purposes, it has been the policy and practice to proceed in the name and through the instrumentality of a corporation. The wisdom of this policy has been questioned, but its legality is beyond controversy. It is none the less, therefore, a taking for and on behalf of the State, notwithstanding it may be done in the name of a corporation.

What is the measure of compensation which the citizen is entitled to demand for his property when thus taken? We think the general concurrence of authority is that the true measure is the market value of the property. Mr. Cooley says, "The principle upon which the damages are to be assessed is always an important consideration in these cases; and the circumstances of different appropriations are sometimes so peculiar that it has been found somewhat difficult to establish a rule that shall always be just and equitable. If the whole of a man's estate is taken, there can generally be little difficulty in fixing upon the measure of compensation; for it is apparent that, in such cases, he ought to have the whole market value of his premises, and he cannot reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon that subject, or whose business or experience entitles their opinions to weight." Cooley, Const. Lim. 565.

Measure of
compensation.
Owner entitled
to market
value.

In *Boom Co. v. Patterson*, 98 U. S. 403, the court say, "The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted?"

A frequent source of confusion in cases of condemnation is that property sometimes seems to have a value other than and different from its market value. Bouvier, in his definition of "value," says, "This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing other goods with it. The first may be called the

value in use, the latter value in exchange." Webster recognizes a difference between "intrinsic" and "exchangeable" value. Webst. Dict., "Value." We also read in the law-books of the *pretium affectionis* which sometimes attaches to property, and is recognized by the courts. This theory that property may have more than one value does not go, however, without dispute. Judge Lumpkin, in *Harrison v. Young*, 9 Ga. 359, says that "the value of land or any thing else is the price it will bring in the market." Whether this theory of different values is well or ill founded, we think that every one who has had experience in trying condemnation cases will corroborate us in saying that such an idea obtains to a great extent among those who are called to testify as to the value of property. Many witnesses are never prepared to answer as to the value of property until they first inquire the purpose for which it is to be valued. We find illustrations of this by looking into the record of the testimony in this case.

There are authorities which hold that the land-owner is not restricted to the market value of the property. Such a doctrine is announced in *Robb v. Turnpike Co.*, 3 Metc. (Ky.) 117, where the owner was allowed to recover more than the market value of the property. We think, however, that these cases are exceptional, and that the general current is the other way. If any thing were wanting to satisfy us as to the correctness of the rule as we have announced, it is supplied by the concurrence on this point of the distinguished counsel who are arrayed against each other in this case. The following instruction seems to have been given by his honor the circuit judge, with the approval of counsel on both sides: "*Second*, The owner is entitled, not simply to such sum as the property would bring at forced sale, but to such sum as the property is worth in the market, — that is, to persons generally; and in ascertaining the value it is not proper to add a value to the land because the land is indispensable or necessary to the railroad company." Other instructions substantially to the same effect were given either by the court on its own motion, or at the request of the parties, and without objection.

Since, then, the market value is the criterion of damages, we are led to inquire, what is the market value? The word "market" conveys the idea of selling, and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay.

Same.
Market value,
how ascer-
tained.

The owner, in parting with his property to the State, is entitled to receive just such an amount as he could obtain if

he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value, and to give him less would not be full compensation. Of course, real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value sometimes requires effort and negotiation for some weeks, or even for some months. And, when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale upon short notice, but the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property. Yet it must be the amount which could have been obtained for the property with reference to the market value at the time of its appropriation. One who anticipates an increase in the value of his property may feel it a hardship to surrender it without receiving more than its present market value; but it would be a hopeless task to either measure or satisfy the anticipations of a sanguine land-owner. If the market value is the price for which the property could be sold on the market, we are next led to inquire, how is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value. Here is one of the recognized exceptions to the general rule that witnesses are to state facts, and not to express opinions. When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, advantages, and surroundings, though ordinarily this would be uncalled for unless his estimate was attacked on his cross-examination; in which case the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps we should say cumulative, facts, to support the estimates made by witnesses, is a matter that must be left very largely to the discretion of the presiding judge. We would not undertake to fix the limits of a discretion so necessary to be exercised. We deem it proper, however, to say that the presiding judge should not suffer collateral issues to spring up and multiply, or the jury to be taxed with facts and figures which could throw no appreciable light upon the question in hand, namely, the ascertainment of the market value of the property. As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land-owner should be allowed to state, and

Same.
Range of
testimony to
show market
value.

have his witnesses to state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury, and the opposing counsel for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make. This is only another way of stating the rule laid down as follows in *Boom Co. v. Paterson, supra*: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties."

Taking this rule as a line of departure, we proceed to determine the point—we may say the only point—which counsel

Same. Special
value of land as
bridge-site.

have made the subject of controversy in their briefs; that is to say, whether it was competent for appellees to adduce evidence to show the value and advantages which the Point of Rocks possessed as a bridge-site. The counsel for appellant contends that the fact that the Point of Rocks constitutes an eligible bridge-site is not properly admissible as an element of value in this case. But, inasmuch as the counsel each accuse the other of mis-stating his contention, it will perhaps be safest to allow the counsel for appellant to state his position in his own way. We accordingly quote from his brief as follows: "We contend, that, having a special right under the laws of Arkansas to construct the road which we have constructed, and of erecting said bridge, and the defendants not having shown *any such or similar right*, that the defendants cannot have damages *based upon a use to which they could not have put the property*, but only for being deprived of the right to devote the property to such uses *as the law allows them to devote it to*." "If Woodruff did not have the right to bridge the Arkansas, he has not been deprived of any thing but his land." This is asking us to put fetters on the market value, if it is not a proposition to discard it as a criterion of damages altogether. It can hardly be doubted, that, if Woodruff had gone upon the market to sell this property, he would not have concealed the fact that it possessed superior advantages as a bridge-site. Now, if he would not have concealed it from a purchaser, it would be unfair to him for the court to conceal it from the jury. On the other hand, if one had been about to purchase this property, he would hardly have been so obtuse as to overlook an element of value so obvious as its eligibility for a bridge-site. Railroad and bridge companies do not condemn all the land they make use of in their location. The amount they obtain in this way constitutes, perhaps, a small per cent of what they utilize. They are frequently in the market as purchasers, and they are

sometimes in a position to dictate very favorable terms. We think the probable demand that there may be for suburban land for depot and bridge sites is a recognized factor in the market value of property in some cases. All that lends value to any thing that we possess is the fact that other people want it, and are willing to pay the money to get it. If it were announced that a point of rocks on the Mississippi River at Hopefield, opposite Memphis, was offered for sale upon the market, it is easy to predict that there would be no lack of bidders, and that the price offered would be very much above what the property would be "worth as a piece of land." In their anxiety to secure property so valuable, bidders would hardly delay until they had obtained authority to build a bridge.

Of course, it does not follow that, because a particular spot of ground constitutes a good bridge-site, it therefore has great market value. There may be no reasonable probability that any one will ever want to build a bridge at that point. This probability is an essential condition of value in such cases. If the market value of the property is the true criterion of damage in these cases, it also follows that the uses to which the owner might apply the property is a matter of no significance. When we go to buy property for purposes of our own, the use to which the vendor has applied it, or could apply it, is a matter of secondary consideration. If, instead of its salable value, the owner was entitled to recover for his property only what Bouvier calls its "value in use," then the utility of the property to the owner would become an all-important inquiry. But this, as we have shown, is not the criterion. The counsel for appellant cites very respectable authority to support his contention, but the decisions cited are in direct conflict with the more authoritative cases of *Boom Co. v. Patterson*, *supra*, and *Railway v. McGehee*, 41 Ark. 207; s. c., 20 Am. & Eng. R.R. Cas. 82. To these cases we adhere, understanding them, as we do, to go no further than to hold that the owner may be allowed to show every advantage which his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market.

The instructions asked by appellant, and refused by the court, were as follows : —

"No. 3. That, in considering the question of the value of the property, the jury will not award the owner an amount for damages based upon what the railroad company may have saved by taking the land, but will only allow ^{Same.} as damages the amount which the owner may have ^{Instructions.} been damnified by the loss of his property, and in their estimate of loss they may consider all the uses to which a *person* could have devoted the property.

"No. 4. Persons or corporations are sometimes authorized to build railroads and take property for that purpose ; and, in fixing the value of the property, the rule is not, how much is the land worth to the railroad company, or how much the railroad company will save by adopting a route over the land in controversy, but what is the value of the land to the owner, considering all the uses to which it might be devoted by him."

These instructions antagonize, as they were evidently intended to do, the doctrine which we have announced. By italicizing the word "person" in the first of these instructions, its obnoxiousness, which would not otherwise have been readily detected, is made apparent. In determining the market value of land, we must not restrict ourselves to what *persons*, as distinguished from corporations, would pay for it. Both have the right to buy, and the possibility of their doing so should be considered. The refusal to give these instructions meets our approval, as does also the giving of appellees' instruction objected to by appellant.

It seems to us that counsel for appellant magnifies the difficulty and overrates the importance of obtaining and owning a bridge franchise. Whatever may be the case elsewhere, so far as Arkansas is concerned, perhaps the easiest and cheapest part of building a bridge or a railroad is obtaining the charter. The most difficult things to obtain are the money with which to build, and a rock upon which to land. To obtain charters, and sit down with them in the pathway of advancing improvements, has been a favorite way of making money by those who are enterprising, but impecunious. This practice has been regarded as somewhat disreputable, but we think no one could criticise the owner of a bridge-site for demanding all that he could probably realize from any one who might desire to purchase or utilize his property.

One or more witnesses for appellees were asked to give the comparative cost of building bridges at different points along the river-front above and below the Point of Rocks ; or, rather, to state the difference in such cost. The witnesses were also asked, "What is the value of the property for bridge purposes?" It would have been less misleading to have asked, "What would be saved by building a bridge at this point, as compared with other points below and above?" Or, "What were the pecuniary advantages offered by this point for building a bridge?" It is very apparent, however, from the argument, that the objection taken by counsel is not the objection which we take to this interrogatory. He objects to any and all testimony about a bridge-site, while we only criticise because we are disposed to suspect that counsel for appellees introduced the word "value" in this connection as a sort of covering for the rather scant testi-

mony with which their case was clothed. In fact, if there had been an ample supply of direct testimony as to the market value, we cannot say that the form of this interrogatory would have called for any animadversion. We think, however, that, if any mistaken impression was made upon the minds of the jury by this method of examination, it was effectually removed by the emphatic and repeated injunctions contained in the instructions, to the effect that the market value should be considered by the jury as the aim and end of their verdict.

Not being able to put our finger upon any error in the ruling of the court, we are asked to review the verdict upon the testimony. This is a delicate duty in any case, and especially so in a case where the sole issue is one as to value. This is so peculiarly within the province of the jury, it is a matter in which we can act with so little intelligence or satisfaction, and there is so little of finality about any judgment we could render on this point, that nothing but an extreme case would justify our interference. If there was no evidence to support the verdict, we would not hesitate to exert our authority to set it aside. It must be very seldom, however, that the verdict is entirely unsupported by evidence in a case where there is but a single and simple issue submitted to the jury, as in this class of cases. The evidence is not entirely satisfactory to us, and yet we think it fairly conduces to show that the principal thing which lent value to the Point of Rocks was its eligibility as a bridge-site, and that it had been somewhat coveted for this purpose. If its principal value consisted in its advantages for bridge purposes, it can hardly be claimed that the jury went beyond the estimates of the witnesses.

New trial
for excessive
damages.

As long as witnesses differ so widely in their opinions as to values, and as long as litigants measure value so entirely by the standard of self-interest, we cannot hope for verdicts that shall be satisfactory to both parties. The utmost to which we can hope to attain is to sometimes reach a verdict that is unsatisfactory to both parties. That very happy consummation seems to have been accomplished by the first verdict of \$10,000 in this case. The fact that both parties asked to have it set aside was a most potent reason for letting it stand. The counsel for appellant sincerely feels, no doubt, that we would be doing his client the greatest good to set aside this second verdict. The verdict, we must confess, does some violence to our own judgment in the matter; yet we are not at all persuaded that appellant would fare better on another trial, and there must be an end to litigation some time. We conclude, therefore, to end the present contention by affirming the judgment below.

Market Value of Property taken as the Measure of Damages.—For cases considering this question, see *Everett v. Union Pacific R. Co.*, 10 Am. & Eng. R. R. Cas. 204; *California Southern R. Co. v. Colton L. & W. Co.*, 14 Ib. 194; *King v. Minneapolis Union R. Co.*, 17 Ib. 93; *St. Louis, etc., R. Co. v. Anderson*, 17 Ib. 97; *Little Rock, etc., R. Co. v. McGehee*, 20 Ib. 32; *Chicago, etc., R. Co. v. Jacobs*, 22 Ib. 97; *Chicago & North-western R. Co. v. Chicago & Evanstown R. Co.*, 20 Ib. 158; *Low v. Concord R. Co.*, 25 Ib. 199.

Setting aside Verdict in Condemnation Proceedings on Account of Excessive Damages.—See *Clarke v. Chicago, Kansas, & Nebraska R. Co.*, and note *ante*.

Measure of Damages.—**Value before and after taking.**—Where the court instructed the jury that the measure of damages for the land taken for a railroad was the actual damage to the land; that that would be best ascertained by what the land was worth before the road was built, and what afterwards, and they were not to consider speculative or imaginary damages, *held*, that this was the proper rule governing the assessment of damages. *Cresson, etc., R. Co. v. Aunsman (Pa.)*, 11 Atlantic Rep. 561.

Measure and Elements of Damage for Land taken by Railroad in Illinois.—In a recent case (*Chicago, B. & N. R. Co. v. Bowman*, 13 N. East. Rep. 814), Judge Shope collects the Illinois cases, and states the rules as follows: "In reaching their determination, it was competent for the jury to award appellee compensation in dollars and cents for the fair market value of the land proposed to be taken, having proper regard to the location and advantages as to situation, and the purposes for which it was designed and used. *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; s. c., 14 Am. & Eng. R. R. Cas. 245; *Chicago & N. W. R. Co. v. Chicago & E. R. R. Co.*, 112 Ill. 589; *Dupuis v. Chicago & N. W. R. Co.*, 115 Ill. 97; s. c., 23 Am. & Eng. R. R. Cas. 93; *Chicago & E. R. R. Co. v. Jacobs*, 110 Ill. 414; s. c., 22 Am. & Eng. R. R. Cas. 97; *De Buol v. Freeport & M. R. Co.*, 111 Ill. 499. And where but a part is taken, and the part taken is of greater value in connection with the whole than as a separate parcel, the measure of damages will be the fair cash value of the part taken as a part of the whole. *Chicago & E. R. R. Co. v. Blake*, 116 Ill. 163; s. c., 24 Am. & Eng. R. R. Cas. 288.

"Under appellee's cross-petition, it was the duty of the jury to award to appellee such damages in dollars and cents as her lands not taken would sustain, if any, by reason of the construction of the proposed railroad and its continued use and operation through her farm. It was competent for the jury to consider and give compensation for all actual and appreciable injuries resulting from the construction and operation of the proposed railroad (*Alton & S. R. R. Co. v. Carpenter*, 14 Ill. 190); and if the lands not taken would be depreciated in value by the construction and operation of the proposed railroad, the measure of damages would be the difference in their market value before the construction of the road and after its construction. *Chicago & P. R. R. Co. v. Francis*, 70 Ill. 238; *Page v. Chicago & St. P. R. Co.*, Id. 324; *Eberhart v. Chicago & St. P. R. Co.*, Id. 347; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *Dupuis v. Chicago & N. W. R. Co.*, *supra*.

"In determining this the jury would be justified in considering the injury to her land, arising from inconveniences actually brought about and occasioned by the construction of the proposed railroad, or incidentally produced by dividing her land, as to water, pastures, and improvements, although such injury and damage might not be susceptible of definite ascertainment (*Jones v. Chicago & I. R. R. Co.*, 68 Ill. 380; *Rockford, R. I. & St. L. R. Co. v. McKinley*, 64 Ill. 338; *Chicago & I. R. R. Co. v. Hopkins*, 90 Ill. 316; *McReynolds v. Burlington & O. R. Co.*, 106 Ill. 152); and for such incidental injury as would result from the perpetual use of the track for moving trains, or from danger of killing stock, or injury to pasturing stock, or escape of fire, and, generally, for such damages as are reasonably probable to ensue from

the construction and operation of the proposed road. *St. Louis & S. E. R.R. Co. v. Teters*, 68 Ill. 145; *Chicago & I. R. R. Co. v. Hopkins*; *Rockford, R. I. & St. L. R. R. Co. v. McKinley*; and *McReynolds v. Burlington & O. R. Co.*, *supra*."

It was also *held*, that the fact that the land is already crossed by one road the court declines to say may not be considered by the jury in determining the damages by reason of the construction of the new line of road. The physical condition of the land, whether affected by another railroad, water-course, or other natural or artificial objects, must be considered, not in respect of the damages or depreciation caused by such other railroad or water-course, but for the purpose of determining the damages occasioned to the owner by the proposed improvement.

CALUMET RIVER R. CO.

v.

MOORE, *et al.*;

SAME *v.* LEFFLER, *et al.*;

SAME *v.* FREEMAN.

(*Illinois Supreme Court, March 26, 1888.*)

Eminent Domain. — Verdict. — Reversal for Excessive Damages. — Where the jury fix the damages for property taken by a railway far below the highest estimate, and somewhat above the lowest, given by the witnesses, the court will not set aside their verdict unless it appear that the result reached by the jury is clearly unreasonable, and the damages grossly excessive.

Same. — How Compensation is to be Estimated. — Where private property is taken for public use, the compensation is to be estimated with reference to the uses for which the property is suitable in its then condition, considering its location, situation, and quality, and the present or prospective business wants in that locality.

Same. — Exhibition of Plan of Proposed Improvement. — The exhibition of a plan showing no more than a contemplated improvement, to which it was thought the premises were well adapted, is not improper, where the court limits its consideration to the uses to which the property may be put, and excludes the consideration of whether the improvement will be a profitable investment.

Same. — Instructions. — Damages. — Evidence. — An instruction which refers the question of damages to the judgment of the jury under the evidence, does not permit the jury to act outside of the evidence; and an instruction that, if the jury believe the damages exceed the benefits, "provided they believe there are such benefits," does not assume that damages are proved, and the question of benefit in doubt, when the concluding words "under the evidence" govern both antecedent propositions.

APPEAL from a judgment of the Cook Circuit Court, Prendergast, J., against the plaintiff in three separate proceedings for the condemnation of a right of way. Affirmed.

The facts are stated in the opinion.

Frank F. Loesch and *Charles A. Allen* for appellant.

Seth F. Crews for appellees.

SHOPE, J. — The three cases of the Calumet River Railway Company *v.* Clara Moore, *et al.*, the same *v.* Amelia S. Leffler, and the same *v.* Jeanette Freeman, involving the condemnation of the right of way of appellant company's railway across adjoining tracts of land, and presenting substantially the same questions, will be considered together. An objection common to each case is, that the damages awarded were excessive, and the judgments severally rendered should be reversed.

As is not unusual in cases of like character, there was wide divergence in the evidence of the witnesses, both as to the value of the land taken, and as to the damages to adjacent lands of the several owners not taken. The estimates of the value of lot 2 ranged from \$100 to \$1,500 per acre, and of lots 3 and 4 from \$100 to \$2,500 per acre. In respect of the damages to portions of the lots not taken, there was equally wide disparity. The jury seem to have considered this evidence, and fixed the damages to be awarded to appellees, in each instance, at a sum far below the highest estimates, and somewhat above the lowest, given by the witnesses. Ample evidence is disclosed, independently of the personal inspection of the jury, upon which the verdict as to each tract may rest. In such cases this court will not be justified in reversing, unless it appears that the result reached by the jury is clearly unreasonable, and the damages awarded are grossly excessive, so as to evince that the verdict has been the result of passion or undue and improper motive or influence. Nothing of the kind is apparent here. Counsel concede that this rule is applicable to land taken, but question its applicability to land damaged but not taken. We are unable to perceive upon what principle the distinction suggested can rest. The rule has its basis in the office performed by the jury. It is their special province to weigh and consider the evidence; and so long as their action is based upon evidence, and is free from the taint of corruption, passion, or prejudice, and within reason, courts must accept and give effect to it. *Chicago & E. R. Co. v. Blake*, 116 Ill. 163; s. c., 24 Am. & Eng. R. R. Cas. 288.

It is said that improper elements of damage were permitted to be shown by the evidence, and the court improperly instructed the jury in respect thereto.

Two of these parcels of land, lots 3 and 4, abut Calumet River, and the other one is cut off from the river about four hundred feet. This river falls into Lake Michigan at South Chicago. The north line of lot 2 is 114th Street; and the distance up the river, from thence to the river mouth, is three and a half miles. From the mouth of the river south, as far as 95th Street, more or less of the river front appears to have been docked; and from 95th Street to the property in question, it is equally available for dock purposes, though as yet no improvements of that character have been constructed, except one at Cummings, half a mile north of this property.

"It was conceded," counsel for appellant says in his brief, "by all the witnesses, that this river property had a value as possible dock property;" and the evidence clearly tended to show that fact. But it is said that the evidence does not show that there is now any demand for docks at this point on the river; and that the consideration of such possible demand introduced speculative elements; and that the estimates in respect thereof were speculative and remote, and therefore improper.

In proceedings for condemnation of private property for public use, as is here sought to be done, the damages to be awarded as compensation to the land-owner must be based upon the fair cash value of the land at the time of the condemnation thereof.

How compensation is to be estimated.

The questions ordinarily to be determined by the jury are: (1) What is the present market value of the land taken? and (2) To what extent, if at all, will the remainder of the tract of land not taken be depreciated in its market value, by reason of the taking and appropriation of the land taken to the proposed use? The compensation is to be estimated with reference to the uses for which the property is suitable, in its then condition, having regard to its location, situation, and quality, and to the business wants in that locality, or such as might reasonably be expected in the near future. If these lots were available for dock purposes, — for which, as shown, there was no immediate demand, — their value when improved by the building of docks, the profits that might be derived therefrom, or the value of the lots at some future time — as when business or the wants of the community might make profitable the making of docks or slips on this property, — would be merely conjectural and remote, forming no proper element in estimating the damages to be paid. But if the fact, that these lots were located with a frontage on this river, at a place where they could at some future time, when demanded, be made available as dock property, enhanced their present market value in their then condition and state of improvement or want of improvement, that fact would be competent and

proper to be shown, and be considered by the jury in estimating the damages. It can make no difference that there might be no present demand for docks upon these lands; if, in consequence of their supposed adaptation to such use, they had an increased market value above what they otherwise would have, such value forms the proper basis of recovery.

We said in *Chicago & E. R. Co. v. Jacobs*, 110 Ill. 414; s. c., 22 Am. & Eng. R. R. Cas. 97, that in these cases "the real issue was, what was the market value of the property for any purpose for which it is adapted or might be used? And so in *Dupuis v. Chicago & N. W. R. Co.*, 115 Ill. 97; s. c., 23 Am. & Eng. R. R. Cas. 93, we held, that if lands were valuable by reason of their location on or near a river, for the purposes of operating a sawmill or factory, or any other purpose, testimony to prove the same was proper for the consideration of the jury, in determining the fair market value of the premises. *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; s. c., 14 Am. & Eng. R. R. Cas. 245; *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 369; s. c., 20 Am. & Eng. R. R. Cas. 25.

The evidence in this case shows that these lots, 3 and 4, had a market value based upon their availability to be put to the purpose indicated; and so far as the evidence tended to show the present market value of the lots, we are of opinion it was competent, and that damages based thereon are neither remote nor speculative. It is evident that the jury estimated the damages from the present cash market value of the land as they found it to be from the evidence, as they were instructed by the court to do. The jury were expressly told, that, in determining the value of the lots for dock purposes, the value should be estimated at its present cash market value. The jury had before them evidence tending to show the capabilities and adaptability of these parcels of land to dock purposes, by reason of their location and their abutting on this river, and that the market value thereof, as then situated, was enhanced by this fact. It clearly appears that their availability for dock purposes is wholly destroyed by the taking and appropriation of the right of way across the lots by petitioner's road. The injury is permanent; and, viewing the case and all its facts, we cannot say that the damages awarded were grossly excessive or unreasonable.

It is argued that the jury must have considered improper elements in the cases of *Leffler* and *Freeman*, from the fact that there is great disparity between the damages awarded them and the damages awarded appellees *Moore* and others; but it will be only necessary to say, that lot 2, owned by the latter, is not shown to be adapted to dock purposes, to account for the difference in the damages awarded, if there were no other reason therefor.

On this trial, appellees Leffler and Freeman offered, and the court permitted to go to the jury over appellant's objection, a plat of a proposed improvement, viz., a slip 100 feet wide, — 50 feet on lot 3 and fifty feet on lot 4, — and extending back from the river about 1,000 feet, and showing the water fronts of proposed docks along the river. In admitting this plat the court said, "The court receives the map merely as an illustration of one of the uses for which it is claimed the property is adapted, and expressly limits it to that object." And, at the request of appellant, the court gave the following instruction :—

Exhibition of
plan of pro-
posed improve-
ment.

"The court instructs the jury that the evidence of the plans or intention of the owners of lots 3 and 4 in question, to construct a slip between said lots, or to make dock property of said lots, or either of them, should not be considered, by the jury, to enhance or increase the damage of said owners by showing that such construction of a slip or dock would be a profitable investment ; but the jury should consider the evidence of such plans or intentions merely on the question as to what uses said lots might or might not be adapted, giving to such evidence such weight as the jury believe it is entitled to. And the court further instructs the jury that they must find the just compensation to be paid for each of said lots in its present condition, separately."

The introduction of this plat, for the purposes named, and limited by the trial judge at the time, in connection with the instruction given the jury in respect thereto, cannot, under the authority of *Chicago & E. R. Co. v. Blake*, 116 Ill. 163 ; s. c., 24 Am. & Eng. R. R. Cas. 288, be regarded as erroneous. It was not pretended that the slip had been constructed or the docks erected ; indeed, it was a fact known to the jury, from their inspection of the premises, that the land was in its natural state, unimproved in any way. This being so, the exhibiting of a plat, showing no more than a contemplated improvement, to which it was thought the premises were well adapted, and which the construction of the proposed railway would render impossible or seriously interfere with, could not have misled the jury into allowing damages for an improvement not in existence.

The remaining objections of appellant relate to the instructions given on behalf of the appellees. While it is true that the finding of the jury is always to be based upon the evidence, — and great care is to be used in drawing instructions not to exclude this principle, — it is the judgment of the jury, based upon and springing out of the evidence, that takes form in the verdict. Hence, an instruction which tells the jury that they are to assess damages at such sum as, in their judgment, the defendants are entitled to, under

Instructions.
Damages.
Evidence.

the evidence, is not open to the criticism that it tells the jury they may make up a belief and judgment outside the evidence. Nor is an instruction which tells the jury that, if they believe the damages exceed the benefits, provided they believe there are benefits, then they should assess the damages in excess of benefits at such sum as, in their judgment, the defendants are entitled to, under the evidence, — open to the objection that it tells the jury positively that there are damages, but that the benefits are doubtful. The concluding words, “under the evidence,” relate to and govern both antecedent propositions, — damages no less than benefits, — and must have been so understood by the jury.

Finding no error in the record, the judgments of the County Court of Cook County in the cases named will be affirmed.

Reversal of Verdict for Excessive Damages. — See *Little Rock Junction R. Co. v. Woodruff*, *ante*, p. 169; *Clarke v. Chicago, etc., R. Co.*, and note, *ante*, p. 156.

Estimation of Compensation with Reference to Uses for which Property taken is Suitable. — See *Chicago & N. E. R. Co. v. Chicago & E. R. Co.*, 25 Am. & Eng. R. R. Cas. 158; *Little Rock, etc., R. Co. v. McGehee*, 20 Ib. 82; *Washburn v. Milwaukee, etc., R. Co.*, 20 Ib. 25; *Scott v. Indianapolis, etc., R. Co.*, 10 Ib. 189; *Sherman v. St. Paul, etc., R. Co.*, 10 Ib. 193; *Everett v. Union Pacific R. Co.*, 10 Ib. 204; *St. Louis, etc., R. Co. v. Kirby*, 10 Ib. 214.

Plan of Contemplated Building Admissible. — *Chicago, etc., R. Co. v. Blake*, 24 Am. & Eng. R.R. Cas. 288.

Value Peculiar to Owner's Business. — In *Cedar Rapids, etc., R. Co. v. Weiden (Mich.)*, 38 N. W. Rep. 298, it was held that, where the landowner is using his property in lucrative business, in which the locality and surroundings have a bearing on its value, he is entitled not only to the money value of the property itself, but also to such compensation as will reimburse him for the interruption of his business and its damage by the changed condition of the locality.

POTTS

v.

PENNSYLVANIA SCHUYLKILL VALLEY R. CO.

(*Pennsylvania Supreme Court, March 19, 1888.*)

Eminent Domain. — Assessment of Damages. — Single and Disconnected Properties. — Two properties having no physical connection cannot be regarded as one in the assessment of damages for a right of way, unless they are so inseparably connected in the use to which they are applied, that the injury of one must necessarily and permanently injure the other.

ERROR to the Common Pleas of Montgomery County, to review a judgment on a verdict for land damages, March term, 1886. Affirmed.

This was originally a petition of E. Channing Potts and E. Channing Potts and William W. Potts, copartners, trading as E. Channing Potts & Brother and E. Channing Potts & William W. Potts, as tenants in common, for the appointment of viewers to assess damages against the Pennsylvania Schuylkill Valley Railroad Company, for lands taken by it in the construction of its railroad.

Viewers were appointed, who awarded the plaintiffs \$10,357. Both plaintiffs and defendant appealed.

At the trial before Swartz, J., the facts appeared as follows:—

For twenty years previous to 1873 Robert T. Potts was the owner of a quarry located on a tract of land in Whitemarsh Township, Montgomery County. He was engaged in the business of quarrying, sawing, and selling marble. The marble was sawed at the quarry, and then transported in wagons to a siding of the Philadelphia & Reading Railroad at Spring Mill, about a mile distant from the quarry. At this point he owned about four acres which were used for storage and for loading and shipping on the Philadelphia & Reading Railroad to the sales yard or depot at Ninth and Thompson Streets in the city of Philadelphia, also owned by him.

Sept. 20, 1873, the will of Robert T. Potts was admitted to probate. By it these three properties were devised to E. Channing Potts, subject to legacies of \$30,000 on the quarry property. They were used by him in the marble business until Aug. 22, 1881. He then conveyed the undivided one-half of the quarry property to his brother William W. Potts. At the same time he formed a partnership with his said brother under the firm name of E. Channing Potts & Brother to carry on the business of quarrying, sawing, transporting, and selling marble, and leased the three properties by verbal lease to last as long as the partnership should continue. June 18, 1883, the Pennsylvania Schuylkill Valley Railroad Company located its road on the Spring Mill lot, appropriating about half an acre of the land. Its road ran parallel with the Philadelphia & Reading Railroad, between that road and the quarry, the grade lines of the former being about two and a half feet above that of the latter, cutting off the switch and siding connections which the plaintiffs had with the Philadelphia & Reading Railroad.

The plaintiffs proposed to show in the course of the trial that the business was one business, and that the three properties were connected together in such a way that the destruction of any one of them involved the destruction of the other two; that the piece of property which was in Mr. E. Channing Potts's own name was an essential link to join the two properties together, and that the moment that was destroyed, it destroyed the usefulness

of the other two; and that the damages that resulted to E. C. Potts & Brother in the prosecution of their business involved a large loss to them in the carrying-on of their traffic, and depreciated the value of their properties which were thus cut.

This offer was rejected by the court, and a modified allowance of the offer was admitted. The court allowed E. C. Potts & Brother "to prove their leasehold, and in order to ascertain its value, the jury are entitled to have a full description of the business conducted there; and in order that the jury may find what that business was, they are entitled to know just how the business was conducted. Then the only other party that can recover, as I view it, is the owner of the particular railroad lot. He is to recover for the injury or destruction of this particular lot." [1]

E. Channing Potts was asked this question: —

How much has the destruction of this siding, and its use in connection with the marble quarry, affected the market value of your quarry as a quarry?

The court sustained objections to the question. [2]

Plaintiffs also offered to prove, that in consequence of the destruction of the siding connections with the Norristown Railroad and the cutting of this lot, they suffered a depreciation in the market value of the hundred acres of ground which is the marble quarry and plantation, to the extent of many thousands of dollars, as this piece of ground was essentially a part and parcel of the others, and has been so used from 1838 up to the time of the taking and injury by the defendant company.

BY THE COURT. — Offer refused. [3]

The plaintiffs also offered to prove that the property which the railroad company actually took is part and parcel of the marble quarry and business conducted there, and that the depreciation of the market value of this property is several thousand dollars, say \$30,000.

BY THE COURT. — It appearing that the quarry property is removed a mile or more from this shipping point or lot used for shipping purposes, the court declines to hear any testimony as to the value of the shipping lot as part of the quarry property, but will allow the witness to give the market value of the shipping lot immediately before the location of the railroad, and its market value immediately after that location, for the purpose of determining the damages to that property. [4]

Wallace Henderson was asked the following question: —

Q. Assuming that the marble quarry was being used for the purpose of carrying on the marble business and the property at Spring Mill, which was used in connection therewith, as a shipping point to the place of sale in Philadelphia, can you state

how the construction of the Pennsylvania Schuylkill Valley Railroad has affected the market value of these properties together?

Defendant objects. Objection sustained. [5]

The plaintiffs presented the following points:—

The jury must allow E. Channing Potts, as owner of the Spring Mill lot, such damages as they may find he has sustained by reason of the injury to his shipping place there caused by the construction of the road.

Ans. This is true; but in estimating these damages, the jury must not consider this Spring Mill lot or shipping place as part of the quarry property; and the sole measure of damages is the depreciation of the market value of this lot as affected by the location of the railroad of the defendant. [9]

The jury are to allow Potts & Brother, as a firm, such damages as they may find they have sustained by reason of their being deprived of the shipping place upon the Spring Mill lot.

Ans. This is true if the jury find that Potts & Brother, as lessees of the Spring Mill lot, were deprived of their shipping place by the location of the railroad of the defendant; and the measure of damages for the loss or injury to their shipping place is the depreciation in the market value of the balance of the term of their leasehold estate as affected by the location of the railroad of defendant. [10]

If the jury believe the evidence, which is not contradicted, that Potts & Brother were lessees of the marble quarries in connection with the Spring Mill lot as a shipping point and with the yard in Philadelphia, the jury are to allow them, as lessees, such damages as they find they, as such lessees, have sustained, occasioned by the construction of the defendant's railroad.

Ans. I cannot affirm this point as it stands. There is no testimony (that the court remembers) that Potts & Brother were lessees of the marble quarry. If the jury believe the evidence that Potts & Brother were lessees of the Spring Mill property and the yard in Philadelphia, then the damages sustained by Potts & Brother in their leasehold interest must be allowed, and the damages are to be measured as explained in the answer to second point just given. [11]

In considering the question whether the plaintiffs have derived any advantage by reason of the construction of this railroad, they are not to consider any advantages which are common to the whole neighborhood.

Ans. This is true, and yet the advantages that the plaintiffs enjoy in common with others may also be special to the plaintiffs. For example: a railroad company may be entitled to the benefit of an advantage accruing to claimants from the proximity

of a railroad station, although the same advantage would necessarily be enjoyed by the neighboring farmers. [12]

The jury are to allow all damages sustained by either and each of said parties, both direct and consequential.

Ans. This is true; but the damages must be determined by the tests already given to you. [13]

In assessing the damages, the jury are also to allow such damages as Potts & Brother, as lessees, sustained, and all damages that E. Channing Potts has sustained by reason of the defendant not having put in a railroad crossing.

Ans. This is true; but damages could not be included for making the crossing itself, for that is to be made by the company defendant, but for the damages already sustained by reason of its not having been constructed. [14]

The court, Swartz, A. L. J., charged, *inter alia*, as follows:—

“[I charge you that you cannot allow any damages to E. Channing Potts and William P. Potts as owners of the quarry property as tenants in common] [6]; that this quarry property is disconnected with the Spring Mill property, and in this suit they are not entitled to recover for any damages done to the quarry property. . . .

“We will next take up the claim of E. Channing Potts & Brother, as lessees of the Spring Mill property and the yard property in Philadelphia. You will remember the testimony of E. Channing Potts, which is to the effect that he leased to E. Channing Potts & Brother the Spring Mill premises and the yard premises, and that it was used by the firm as a shipping point for marble, sand, and clay. [The lease was a verbal one, and was made on the 1st of July, 1881. It was of an indefinite duration, for Mr. Potts, upon his examination upon that point more particularly, says that it was to continue as long as the partnership was to continue. It therefore had an indefinite term. You could not tell exactly when that lease would terminate. It would depend on a contingency. But this lease was enjoyed by E. Channing Potts & Brother from year to year; that is, they held over from one year to the other. Now, the railroad company located its road on the eleventh day of June, 1883. After that time it became the owner of the right of way over this property at Spring Mill, and the parties interested in that property lost their title that was acquired by the railroad company at that time. The damages, therefore, must be assessed as of that date. What was the balance of the term that E. Channing Potts & Brother enjoyed in these premises,—the balance of the leasehold term? The current year would end on the first day of July, 1883. This road, as I said, was located

on the 11th of June, 1883, just nineteen days before the termination of the current year of the leasehold interest. But here another principle comes in that we must invoke on behalf of these tenants. Where a man holds over from one year to another, he is entitled to three months' notice before he can be compelled to quit the premises. Therefore, as there is no notice of any intention on the part of Mr. Potts to terminate this leasehold interest, and as it does not appear that it was terminated on the 1st of July, 1883, E. Channing Potts & Brother, as tenants of these premises, were entitled to hold over for another year. Their leasehold interest therefore extended to the first day of July, 1884; or, in other words, the balance of their term was one year and nineteen days. For that length of time they had a right to occupy that property; and, if they had been entire strangers to Mr. E. Channing Potts, he could not have ousted them before that time. Therefore we must consider, in the determination of this case, that their leasehold interest extended to July 1, 1884. . . .] [7]

"[Then we come to the claim of E. Channing Potts for damages to his premises; and I charge you here, that, in determining what damages were sustained by his property at Spring Mill, you cannot treat it as part of the quarry property, but you must treat this property as if it was owned by some one entirely distinct from the quarry property.] [8] The same test is to be applied to this property as would be applied to any other property. What was that property worth in the market before the railroad company was located there, and what was it worth in the market after the railroad company was located there? And all the evidence and all the facts and circumstances that were given before you, are to be used only in enabling you to determine what was the difference in the market value of this property by reason of the location of the railroad upon the premises at Spring Mill."

The jury rendered a verdict for E. Channing Potts & Brother, as lessees, for \$2,112.73; for E. Channing Potts as owner of the fee, for \$1,261.33; and as to E. Channing Potts and William W. Potts as tenants in common, they found for the defendant.

Judgment was entered on the verdict, and the plaintiffs took this writ, *assigning as error*: 1-5, the rulings on the evidence; 6-8, the portions of the charge included within brackets; and 9-14, the answers to plaintiffs' points.

Charles Hunsicker and *G. R. Fox* for plaintiffs in error.

Charles H. Stinson for defendant in error.

CLARK, J. — The plaintiffs, E. Channing Potts and brother, were in the year 1883 engaged in the business of quarrying, sawing, and selling marble, etc. Their quarry was
Facts. located on a tract of land in the township of White-marsh, Montgomery County, consisting of about one hundred acres. The product of the quarry was transported in wagons to a siding of the Philadelphia & Reading Railroad at Spring Mill (a mile or more distant from the quarry), where they had a lot of land of about four acres, which they used for storage and for loading and shipping on the Philadelphia & Reading Railroad, to their sales-yard, or depot and business place, at Ninth and Thompson Streets, in the city of Philadelphia.

The Spring Mill lot, and the yard at Ninth and Thompson Streets, were the individual property of E. Channing Potts. The quarry was owned by E. Channing Potts and W. W. Potts, as tenants in common: while E. Channing Potts & Brother were in the possession and enjoyment of all these several properties; to wit, the quarry, the shipping lot, and the marble yard, as lessees from year to year and copartners, conducting the general business of preparing, transporting, and selling the products of the quarry.

We have, therefore, three distinct claims for compensation: first, that of E. Channing Potts, the owner in reversion of the fee of the Spring Mill and Philadelphia properties; second, that of E. Channing Potts and W. W. Potts, tenants in common of the quarry; and third, that of the firm of E. Channing Potts & Brother, lessees from year to year of the three properties combined.

The Pennsylvania Schuylkill Valley Railroad Company located its road on the Spring Mill lot, appropriating one-half acre, more or less, of the land; its road ran parallel with the Philadelphia & Reading Railroad between that road and the quarry, the grade line of the former being about two and a half feet above that of the latter, cutting off the switch and siding connections which the plaintiff had with the Philadelphia & Reading Railroad.

The plaintiffs' contention is, that the partnership business has thereby been broken up and ruined; that the market value, not
Plaintiffs' contention. only of the Spring Mill lot, but of the quarry and of the marble yard, has been greatly impaired and depreciated in the hands of the lessees, and also of the respective owners thereof; that the three properties, although not contiguous, were used as one; that the destruction of the siding and shipping facilities at Spring Mill was an injury to the quarry and also to the sales-yard, and the damages, both direct and consequential, must be awarded to the several plaintiffs in this proceeding, according to their respective injuries and interests.

The court instructed the jury, in substance, that in the assessment of damages they were confined to the Spring Mill property ; that the sales-yard in Philadelphia and the quarry lot in Whitemarsh were disconnected and distinct properties from the shipping lot at Spring Mill ; and that the owners and lessees thereof suffered no injury from the construction of the railroad which could be redressed in this form of proceeding ; and in this we think the court was correct.

The court's instruction.

No case has been called to our attention which rules, explicitly and arbitrarily, that several pieces of real property, not contiguous, cannot for that reason, under any circumstances, be considered as one property. The general rule, however, undoubtedly is, that disconnected properties are to be treated as distinct properties, and damages for right of way will ordinarily be assessed on this principle. Where a person resides upon one of a number of contiguous town lots, but uses all of them together as his homestead, as if the whole constituted but a single enclosure, and a railroad company appropriates a portion of one only of the lots, the damages will doubtless be assessed for the injury done to the whole property. So, if one buys a farm in separate contiguous portions from different persons, but occupies the whole in a body for farm purposes, as one farm, the damages for the appropriation of a part, or even the whole, of one of the original pieces will be assessed upon the injury done to the whole tract. Peculiar and isolated cases may perhaps exist, also, where, although the lands are not in fact contiguous, yet the uses to which they are applied, respectively, are in their nature so intimate and dependent, one upon the other, that an injury to the one must necessarily be taken as an injury to the whole taken together ; for example, the land upon which a water-mill is erected will ordinarily draw to it as an appurtenance, or rather will be regarded as embracing, the ground covered by the reservoir, so that the latter will be regarded as part and parcel of the former, although they are not contiguous.

When disconnected properties are to be treated distinctly, and when as an entirety.

But we do not regard this case as coming within the general exception stated. The quarry was a distinct and disconnected property from the Spring Mill lot, — it was devoted to a wholly different purpose, — and the same may be said of the sales-yard at Ninth and Thompson Streets. The first was a quarry, used for quarry purposes alone, and the product was delivered at Spring Mill over the public wagon-roads ; the second was a shipping point, having no connection with the quarry, by contact of the lines, by railway, or any other private means of transportation ; and the yard at Ninth and Thompson Streets was a sales-yard accessible by the Philadelphia & Reading Railroad ; thus they

were each disconnected from the others, and each was used for a distinct and separate purpose. They were not only different properties, applied to different uses, but the fee was held and owned by different persons ; neither of them could be considered as appurtenant to, or part and parcel of, the other. There was no special reason, outside of the conveniences and appliances existing at Spring Mill, why the marble should be shipped from that point ; and for these appliances the plaintiffs were entitled to be paid. The quarry might be successfully operated without the property at Spring Mill. The railroad was accessible at other points, and, for aught that appears or was offered to be shown, equally available shipping facilities might be supplied elsewhere.

If the company had appropriated a part of the sales-yard in Philadelphia, could it be pretended that damages would accrue for supposed injuries to the properties in Montgomery County ? If the contention of the plaintiffs in error be correct, that the three properties are to be regarded as one, this result must certainly ensue ; but there was no commanding necessity that the marble product of the quarry should be sold at Ninth and Thompson Streets. If that yard was especially valuable for the purpose, compensation commensurate to the injury would be made, and some other market-place could be provided.

An extensive business partnership may conduct a variety of operations as distinct in their character as the location of its various departments ; and if their different and disconnected properties are to be regarded as one property, because they are used in one business, the assessment of damages for right of way would become liable to such complications as would greatly embarrass the administration of the law in this form of proceeding.

In order that two properties having no physical connection may be regarded as one in the assessment of damages for right of way, they must be so inseparably connected in the use to which they are applied, that the injury or destruction of one must necessarily and permanently injure the other.

It is perfectly plain, that, apart from the alleged connected use to which the three several properties have hitherto been applied, the plaintiffs could have no claim arising out of the construction of the road, for any supposed consequential injury, either to the quarry or to the sales-yard ; the railroad did not touch either of them, or any right or easement appurtenant thereto ; and there is nothing upon which an action at the common law could be sustained in such a case.

It did the plaintiffs no harm, therefore, that they were denied the privilege of proving that these properties were used as stated in the offer. In consideration of the case we assume all that was offered to be proved. We are of opinion that the plaintiffs

were not entitled to damages, direct or consequential, for any supposed injury either to the quarry or to the yard at Ninth and Thompson Streets.

The judgment is affirmed.

What is to be regarded as One Tract of Land, for Damages to which, as an Entirety, the Owner is entitled to recover, when a Portion only is taken. — The rule that a land-owner is not only entitled to damages for land actually taken by a railroad company, but also to just compensation for a direct injury to the rest of the tract, resulting from the taking and using of a part thereof for railroad purposes, is settled beyond question. The question, necessarily involved whenever this rule is applied, as to what is to be regarded as one distinct tract in such cases, has been frequently raised. In *Kansas City, etc., R. Co. v. Merrill*, 25 Kan. 321; s. c., 2 Am. & Eng. R. R. Cas. 485, the plaintiff was the owner of 960 acres lying in a body, and used for the purposes of a stock ranch. The railroad ran only diagonally through one quarter section, and cut off the water, timber, the house, and corrals from the main body of land, but did not touch the other quarters of the ranch. A regularly laid-out public highway separated the quarter through which the railroad ran from one whole section. The court held that the land-owner was entitled to recover damages for the injury to the whole property, and not merely for that to the separate quarter over which the railroad was built. Chief Justice Horton, in his opinion, said, "The location of the public highway over the body of land would not affect the right to recover damages for all the property, unless such highway would prevent the land lying on both sides from being one ranch for stock purposes. The evidence shows that the land was used all together."

In another Kansas case it appeared that G. was the owner of a contiguous and compact tract of 240 acres, used by him as one farm. Independence Creek ran in a curved and irregular line through the south-western portion of the farm. This creek was the boundary-line between Atchison and Doniphan Counties; and by it some 60 acres of the farm were in Atchison, and the balance in Doniphan County. Proceedings were instituted in Doniphan County to condemn a right of way for the A. & N. R. R. Co. through this farm. The right of way crossed the farm only in Doniphan County, and touched no part of the farm in Atchison. By whom the condemnation proceedings were instituted, and under what arrangements between the parties, does not appear. The commissioners, in their report, fixed the value of the land taken, and also awarded damages to the balance of the farm as an entirety. The amount of this award was deposited by the railroad company with the treasurer of Doniphan County. On a trial of an appeal from this award to the District Court of Doniphan County, *held*, that such court did not err in permitting an inquiry as to the damage to the farm as a whole, including that part in Atchison County, and in rendering judgment for such damages. *Atchison & Nebraska R. Co. v. Gough*, 10 Am. & Eng. R. R. Cas. 151.

In *Wilmes v. Minneapolis & N. W. R. Co.*, 29 Minn. 242, the award was also not limited to the land described in the petition. It appeared that plaintiff was owner of 120 acres of land, consisting of three forties in line from east to west. The land was occupied and used by him as one farm, his residence being on the easterly forty. Defendant, having located the line of its railway across the two westerly forties, instituted proceedings for condemnation. *Held*, that, in assessing the compensation to be paid to the plaintiff, he is entitled to have the effect of the appropriation of the right of way across the two westerly forties upon the easterly forty considered and

taken into account, although the petition for the appointment of commissioners described the two westerly forties only.

In *Ham v. Wis., etc., R. Co.*, 14 Am. & Eng. R. R. Cas. 204, the railroad company claimed that the inquiry should have been confined to the Government subdivision on which the road was located, although the separate tracts of land, as fixed by the government survey, were used together as one farm, not separately, and as distinct farms. The court held, however, that the injury to the whole farm should be considered. See also *Hartshorn v. Burlington, etc., R. Co.*, 52 Iowa, 613.

In *Reisner v. Depot Company*, 27 Kan. 382; s. c., 10 Am. & Eng. R. R. Cas. 155, the owner of two adjacent lots was held entitled to recover damages to the two lots, although only a portion of one was actually taken, on the ground that the two were used for a single purpose, — that of a hotel yard. See also *Cummins v. Des Moines, etc., R. Co.*, 17 Am. & Eng. R. R. Cas. 86; s. c., 63 Iowa, 397, where it was held, that when two lots are made and used as one property, and a railroad condemns one of them, the owner is entitled to compensation for the injury to the property as a whole. *Welch v. Milwaukee, etc., R. Co.*; 27 Wis. 103; *Driver v. Western, etc., R. Co.*, 32 Wis. 569.

An entire block of ground divided up into lots has been held to be a distinct tract in such cases. *Blue Earth County v. St. Paul, etc., R. Co.*, 28 Minn. 503; s. c., 10 Am. & Eng. R. R. Cas. 209.

Contiguous lots of land claimed by party as a homestead is to be regarded as one tract of land. *Port Huron, etc., R. Co. v. Voorhees*, 14 Am. & Eng. R. R. Cas. 227. And if more than one lot or block is occupied in one business, as in that of a brewery, with necessary buildings on each side of an alley, the damages to the entire property must be paid, and not only the damages to the lot from which the strip of land is taken. But if the fixtures, engines, and appliances could be transferred to the other side of the alley, and placed in such situation that the brewery could have been as effectually operated as it was before, then the actual loss to the owners would have been the trouble and expense of making the removal, together with compensation for the use of the brewery for whatever time it would be necessarily idle while the change and transfer were being made. *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582.

The same doctrine was applied where the tract was composed of several town lots and intervening streets. *Sherwood v. St. Paul, etc., R. Co.*, 21 Minn. 127. So, if the several lots are used as one property, as a lumber-yard or saw-mill lot, and all the blocks were necessary to the enjoyment of the main property, damages may be allowed for the whole tract, for taking away and separating necessary portions of the establishment, although the lots may be separated from each other by a public street. *Chapman v. Oshkosh R. Co.*, 33 Wis. 629.

But in an Iowa case, *Fleming v. Chicago, etc., R. Co.*, 34 Iowa, 353, where certain lots in a town, owned and used with other lots for purposes connected with the same business, but separated therefrom by streets and alleys, were appropriated for a right of way for a railroad, it was held that a jury, in estimating damages therefor to the owner, should not have considered all the lots thus used and separated as an entirety in respect to the business for which they were used, and allow damages accordingly.

It is a general rule, however, that when the blocks and tracts are not used together, no damage can be allowed for blocks separated by streets from the block from which the land is taken. *In re New York Central R. Co.*, 13 N. Y. Sup. Ct. 149. And if a strip is taken adjoining an existing railroad, no damage can be recovered for any supposed injury to land on the other side of the railroad. *In re New York Central R. Co.*, 13 N. Y. Sup. Ct. 149; *Ham v. Wis. R. Co.*, 61 Iowa, 716. And where one farm is separated by a bluff,

and distant from the other through which the railroad passes, there is no compact tract. *Minnesota R. Co. v. Doran*, 15 Minn. 230.

A Farm, Part of which is benefited and part injured, must be considered as a Whole not arbitrarily Divided. — In estimating damage owing to the taking of land for railway purposes, when a part of the lot in question has been temporarily leased as a separate holding, but divided from the rest only by a surveyor's line, the owner cannot exclude such portion from consideration, treating it as a separate lot, and recover for the remainder being cut off from the public road; but the lot is to be treated as a whole, and benefit to one portion owing to proximity to a station may be considered with disadvantage resulting to another. *Baltimore & P. R. Co. v. Springer* (Pa.), 13 Atlantic Rep 76.

When the Question can arise. — The question cannot arise in considering damages to vacant and unoccupied land. *Mills*, Em. Dom. (2d ed.) § 167; *Republican Valley R. Co. v. Fellers*, 56 Neb. 169. And generally, where the railroad company institutes the proceedings, the damages must be confined to the tract named in the petition. In order to recover for other lands, the owner must file a cross-petition. *Chicago, etc., R. Co. v. Hopkins*, 90 Ill. 316; *Jones v. Chicago, etc., R. Co.*, 68 Ill. 380; *Mix v. Lafayette, etc., R. Co.*, 67 Ill. 318. But it has been held in Minnesota that neither commissioners nor court are confined in their inquiries to the damages done to that part of the tract described in the petition of the railroad company, but may inquire into the effect of such taking upon the entire farm or tract out of which the right of way is taken, although only a part of such farm or tract is described in the petition; and the owner is not required to proceed by cross-petition or otherwise to have the description in the petition corrected or enlarged so as to include the entire tract. *Sheldon v. Minneapolis, etc., R. Co.*, 29 Minn. 318. And see *Illinois, etc., R. Co. v. Mayrand*, 93 Ill. 591.

WESTCHESTER & PHILADELPHIA R. Co. *et al.*

v.

GODDARD *et ux.*

(*Pennsylvania Supreme Court, March 19, 1888.*)

Grant of Right of Way. — Single or Double Track. — A railroad company having power to take land for a double track, built a single-track line through plaintiff's lands, and took a release, which contained no description, and put upon the plaintiff the duty to build and maintain the fences. He built the fences immediately, and maintained them for a long term of years. *Held*, first, that a presumption arises that the right of way is limited to the strip of land so fenced, and unless this presumption is rebutted, the railroad cannot encroach beyond the fences for the purpose of building an additional track without making compensation to the plaintiff; second, that mere proof that soon after the road was built the president reported to the stockholders that the right of way for a double track had been secured for the whole line, will not rebut this presumption.

JANUARY term, 1886, before Gordon, C. J.; Paxson, Sterrett, Green, Clark, and Williams, JJ.

Appeal from a decree of the Common Pleas of Delaware County, granting a perpetual injunction. Affirmed.

This was a bill in equity, filed by Kingston Goddard and Helen, his wife, against the West Chester & Philadelphia Railroad Company, Wilmington & Baltimore Railroad Company, for an injunction to restrain the defendants from entering on the plaintiff's lands.

E. A. Price, Esq., the master, reported as follows:—

Mrs. Helen Goddard, one of the plaintiffs, is the owner in fee of a certain messuage and tract of land in the township of Springfield, Delaware County, containing about
Master's re- 8 acres, 3 roods, and 6.39 perches, which she
port. Facts. derived by deed from Elijah Jones and wife, dated
 April 20, 1878, and recorded in the office of the recorder of deeds for Delaware County, in Deed Book N, No. 4, p. 641.

These premises were part of a tract of forty-five acres, of which one William C. Longstreth became seised in fee in the year 1843, and held until the year 1857, and which came down to the said Elijah Jones by a regular chain of conveyances from the said Longstreth.

The West Chester & Philadelphia Railroad Company, named as one of the defendants, was incorporated under the provisions of two Acts of Assembly, one approved April 11, 1848, P. L. of 1850, p. 916, and the other approved April 15, 1850, P. L. p. 407.

On May 6, 1852, the said William C. Longstreth, in consideration of the sum of \$400, which was afterwards paid, executed to the railroad company a grant of a right of way through, over, and upon his land to such an extent as might be necessary for the construction, opening, and use of the road, and a release of all further claim for compensation for any damages that might accrue to the land and appurtenances, or any part thereof, by reason of the locating and construction of the railroad through and upon the same, giving and granting to said company the right to occupy for the said railroad such and so much of the said land as might be required for the same; the said Longstreth agreeing for himself, his heirs, and assigns, to provide and set up a good and sufficient fence on both sides of the road through the land and keep the same in repair, which grant and release is set out in full as Exhibit "A" in the answer of defendant.

No width is mentioned in the grant and release, nor was it ever put on record.

On April 10, 1850, ground was broken in the construction of defendant's road, and a single track was located and constructed under the superintendence of T. E. Sickles, over and through

that part of the land of the said Longstreth, now held and owned by Helen Goddard, all of which lies on the south side of the road.

It seems to have been the intention of the railroad officers at the time of the location to secure ground sufficient width for a double-track road, and the president and engineer in their third annual report made to the company on Jan. 10, 1853, state that a width of twenty-five feet at grade, with the requisite side slopes at excavations and embankments, had been obtained.

There were no visible marks set anywhere to show what lands the company intended to occupy, except in cases where juries were called out to assess damages ; and then stakes were set to show what lands were taken.

Consequently there was nothing placed on the lands now owned by Mrs. Goddard to indicate the extent of the defendant's location, right, or claim under its powers, except the single track referred to, which has never been changed from its first location and through the lands of the plaintiff ; no additional track has ever been constructed on the south side of the original one.

Under the covenant and agreement of his grant, Longstreth erected a post and rail fence on the south side of the road, the whole length of plaintiff's property, immediately after the road was finished. This fence was in a straight line, and at the place where the bed of the road was above grade it was close to the foot of the embankment.

Up to the time of the Goddard purchase this fence had been maintained with some changes in character by Longstreth and his successors in title in exactly the same place as originally located, save at the west end, where for a short distance east from the now Kedron Avenue, along where the railroad is at grade, Sketchley Morton, a former owner, had set the fence bordering his lawn back from the railroad ten or twelve feet, for the purpose of making a road-way to his stable at the easterly end of his lawn, which after being used several years was abandoned ; and the fence was set out at this point to within a foot or two of its old position by his son, which position it continued to occupy until Mrs. Goddard purchased. This part of the fence had been changed by Morton to one of pickets, and Mrs. Goddard replaced it with one of iron.

The rest of the fence had been changed by Morton to one of boards, and this she replaced with one of wire. These new fences were set a foot or two back from the line of the older fences to prevent material falling from defendants' cars from coming on to plaintiffs' land, and have not since been changed in location.

After the location of the railroad, Mr. Sickles, the engineer, says he had a map prepared, showing the amount of land taken

everywhere between West Chester and Philadelphia, and showing a width of at least twenty-five feet at grade, and in excavations and embankments one and a half feet horizontal to one foot vertical, with two and a half feet additional on each side for fencing; all of which he says was to provide the necessary width for a double track, and for side slopes in excavation and embankments. Along the premises in question he says the additional track was to be on the south side of present track, which was built on the north side.

Two copies of this map were made, one a pocket map for Mr. Rutter, the then president of the company, and the other for the office, at which place he left it. This map was not produced before the master, nor was Mr. Rutter called as a witness. Prior to the year 1861, and during the presidency of Marshall B. Hickman, Mr. Sickles says he walked over the road once with an assistant engineer, and made some notes or memoranda in relation to the width taken for a double track, which he fixed at twenty-five feet at grade, with two and a half feet each side for fences, the result of which examination is contained in paper marked "N.Y." and attached to the testimony.

On Aug. 11, 1873, the managers of the company at a stated meeting authorized the committee on road to employ at their discretion an engineer to locate the line of the road.

At a stated meeting of the managers, held on June 8, 1874, the superintendent, under the direction of the president, was authorized to purchase stones to mark the right of way of the company, and have them set as speedily as possible. By virtue of this authority an engineer by the name of Arnold Syberg, an assistant of Mr. Sickles, the original engineer, was employed, who re-run the lines of the road, and prepared a map of his work, which was marked "Map of the West Chester & Philadelphia Railroad, showing the different properties through which the same passes; also the cuts and embankments, scale four hundred feet one inch, resurveyed October, 1873, February, 1874, by Arnold Syberg, C.E.," and filed in the office of the company, a section of which marked "D" is attached to the testimony; and granite stones two and a half feet long, and about four and a half inches square were purchased, and placed at the corner of each property along the line of the railroad.

At a stated meeting of the managers of the said company, held on July 19, 1875, "The committee on road reported specially that in pursuance of a resolution of the board, passed April 11, 1873, an engineer had been employed, Arnold Syberg, who had made a complete survey of the road, as originally located, and filed his report, with maps and plans of the same, in the office of the company on February, 1874; and that the committee had

since caused stones to be set in accordance therewith, except at Henry Townsend's property, near Cheyneys, and Bernard Riley's, at West Chester, which remain to be adjusted," which report was accepted and filed. Two of these stones were placed on the land now owned by the plaintiff; one at the west end near Kedron Avenue, and the other at the east end at the Amosland road. At the west end the stone was set about two feet nearer the track than where the picket fence was afterwards placed. It was put apparently in the line of the old post and rail fence, about in the line of the telegraph poles used by the Western Union and the railroad company, and now stands three feet out from the iron fence which took the place of the pickets.

At the east end the stone would appear to have been set about two feet farther away from the track than the board fence was, as the stone is now exactly in the line of the wire fence which was set two feet farther into the field than the board fence stood.

Similar stones were placed on the north side of the track opposite the two on the south side. The distance between the two at the west end of Mrs. Goddard's line is about thirty-three feet; the distance between the two at the east end of line has not been given. Pending negotiations for the land, Dr. Goddard visited the premises in the interest of his wife, and observed the fences; but he is not clear as to whether he then observed the stones. There was nothing on the ground or on record to call his attention to any rights of the railroad company beyond what it was then enjoying; and no notice of any such rights was ever given to himself or wife in any way, nor to any predecessor in title, so far as shown.

The railroad company now proposes to lay an additional track through the land, south of the existing track, and for this purpose is taking a strip of ground about 600 feet in length, $12\frac{3}{10}$ feet at its greatest width, and of an average width of $6\frac{3}{10}$ feet on the Goddard side of the road, all of which lies south of Mrs. Goddard's present fence, as shown on plot prepared and exhibited by Mr. Lodge, the superintendent of the road, marked "G," and attached to the testimony. This ground is necessary to enable the company to construct a double track, which for a road of ordinary gauge requires 31 feet 3 inches in width at grade.

The width of the road proposed does not at any point exceed 60 feet from the bottom of north slope to the bottom of south slope, and involves filling and the making of an embankment of 8 feet at its highest point, the bank of which, according to the general rule, should be $1\frac{1}{2}$ feet horizontal, to 1 foot vertical. It is to prevent the construction of the additional track as proposed, through and over the lands of Mrs. Goddard, without the damages therefor being first assessed and paid, or sufficient

security given for the same, that the present bill has been filed.

The defendant sets up, that in laying the additional track, it is simply exercising its lawful right so to do, under and by virtue of the agreement with William C. Longstreth, made at the time the road was constructed through his land; that the agreement gave the company sufficient land for a double track, and that it was at that time so located, determined, and designated by the company's engineer.

Such being the facts, the issue between the parties is limited to a very narrow one, and is all involved in the single question,

The question for decision. What land did the company take at the time of the original location of the road? If it then located and took sixty feet or more in width, or sufficient land for a double track, it can claim it now. Its rights were then fixed, and no power could abridge them.

Having been declared a public highway by the eighteenth section of the General Railroad Act of Feb. 10, 1849, its rights could not be encroached upon by any adverse holding, as in Pennsylvania the statute will not run against the public.

For the same reason it is beyond the power of the company to dispose of any of its franchises in any way, and thus limit the public in the use of any rights it had once acquired.

This being the case, the rules of law as to adverse holding, notice of easement, and the protection of the recording Acts, which were invoked by the plaintiff, and which would apply as between individuals, or between an individual and ordinary corporations, are not applicable here.

If they were, the case would be with the plaintiff on all these points. The defendant's rights being therefore protected from infringement, it is only necessary to ascertain what those rights are; and this depends on the question before stated, What land did the Company take in the original location?

The plaintiffs claim that it took no land beyond the present fence on the south side of road, while the defendants claim that it took a strip sixty feet in width, which would extend beyond the fence. The Longstreth grant is indefinite as to width, and in this respect throws no light on the question.

Its solution can only be had by an inquiry into the acts of the railroad company, and those of the successive owners of the land from Longstreth down.

Powers of company as to taking land. Let us first look at the powers of the company in respect to the taking of land for its purposes. By sect. 11 of the Act of April 11, 1848, the president and managers of the company had the power to survey, lay down, ascertain, make, and fix such route as they deemed

expedient for their road, with as many tracks as they deemed necessary.

By sect. 10 of the General Railroad Law of Feb. 10, 1849, companies were given the power to take such land as the president and directors might deem expedient, not exceeding sixty feet in width, except in the neighborhood of deep cuttings or high embankments, etc.

By the Longstreth grant in 1852, the company had the right to take as much land as might be necessary for the construction, opening, and use of said road.

The Act of 1849 did not certainly repeal that part of the Act of 1848 which permitted this company to take land without restriction; but if it did, the Longstreth grant revived its powers, and the effect as to the company was the same as though there had been no repeal. It is doubtful, however, whether sect. 10 of the Act of 1849 applies to this company. A reading of the Act shows that some of the sections apply to companies incorporated before its passage, and some to companies incorporated afterwards. Sect. 10 would seem to apply only to those incorporated afterward; and if so, all question as to the Act of 1848 is removed.

We find, therefore, that both under the Act of 1848 and under the Longstreth grant, the company had the power to take as much land as was deemed necessary for its purposes, without restriction except as to its necessities. The defendants invoke the Act of 1849 in their behalf, and claim that because it gave them the power to take land up to sixty feet in width, and because it was in existence at the time the road was commenced, the presumptions are, that the full sixty feet was taken.

If, as before stated, that part of the Act of 1849 did not apply to this company, it will be readily granted that no such presumption could arise.

Assuming, however, that the Act did apply, and that the presumption is that sixty feet in width was taken, it would not be conclusive of the fact; for such presumption may be removed by evidence of actual possession taken of less ground.

Pa. Canal Co. v. Harris, 12 W. N. C. 435.

While it is true that the company had power under the Act of 1848 to take such land as it needed, yet it does not follow that the title to such as was taken was grounded upon the Act of Assembly. Had the company entered and appropriated the land under the law, and then obtained a release of damages therefor, its title would have been grounded as stated; but it did not. It purchased the right of way of Mr. Longstreth for a consideration; and in his grant he further released the

company from any damages to his other land outside of the right of way by reason of the surveying, locating, or constructing of the road. Whatever rights, then, the company had or exercised were grounded upon the Longstreth grant.

The power of location which the company thus had, whether under the law or under the grant, belonged to it exclusively. It was a right which it was bound to exercise in the beginning, so that its claims might be fixed; and the exercise of this right was a binding expression of its needs and an exhaustion of its powers.

In making this location, the company was not confined to the present needs of its business, but might properly provide for the future requirements of a more extensive traffic. What it needed, however, in the future, was in the first instance to be designated, fixed, and determined. See *N. Y. & E. R. Co. v. Young*, 33 Pa. 182; *Wirth v. Phila. City Pass. R. Co.*, 2 N. W. C. 650; *Kraut's App.* 71 Pa. 64; *Lodge v. Phila., etc., R. Co.*, 8 Phila. 345.

In the exercise of its powers the company entered upon the land of Mr. Longstreth. No sketch, plot, or record of the land proposed to be taken was made; and no marks were put upon the ground, except a road-bed over which, extending to Philadelphia on one side, and to West Chester on the other, was laid a single track; and immediately thereafter Mr. Longstreth, who owned on both sides, erected a post and rail fence along the whole line through his property in pursuance of his agreement; that on the Goddard side being close up to the foot of the embankment, at the place where the road was above grade. In the absence of marks to show that the company had located a road wider than that enclosed between the fences, or of any evidence of a larger right of claim, there is nothing to show that the fence thus set up was not acquiesced in by both parties, as marking the land which the company had taken and located under its powers; and if so, every post became a landmark between them. *Allen v. Mayer*, 1 Del. Co. Rep. 49.

During the occupancy of Sketchley Morton, he made a material change in the character of the fences, consisting of the entire removal of the posts and rails, and erecting in their stead, from the east end, along the disputed territory, a board fence, and for the rest of the distance westward, a picket fence. No objection appears to have been made to this change by the company; and its silence may be accepted as another evidence that the fences were considered to enclose all that the company had in the first instance taken, or to which it had any claim or right. The next step was one taken by the company while the

Effect of
erection and
maintenance
of fence.

Goddard property was still in the ownership and possession of Sketchley Morton.

It was done by the company, of its own motion, without the knowledge of, or consultation with, those who were likely to be affected; and was in its nature both active and aggressive.

The steps
taken by the
company.
Their effect.

This step was the relocation of the line of the road, and the setting of stones to mark the right of way. Its purposes are fully set out. It was ordered and confirmed by the proper authority, and admits of but one conclusion; and that is, that it was for the purpose of ascertaining and marking, by enduring monuments, the land which the company had originally taken for its purposes.

The first action on Aug. 11, 1873, was an authorization of the relocation of the line of the road, which was done by Mr. Syberg, who re-run the line in October, 1873, and February, 1874.

Then came, on June 8, 1874, a direction to the superintendent to purchase stones to mark the right of way of the company, and to have them set as speedily as possible; following which, on July 19, 1875, came the report of the committee on road, stating that in pursuance of the resolution of April 11, 1873, Mr. Syberg, an engineer, had made a complete survey of the road, as originally located, and that the committee had since caused stones to be set in accordance therewith, which report was accepted; the stones on the Goddard property having been set as before found. Where Mr. Syberg procured his *data* from which he re-run the lines does not appear. He does not seem to have followed the memoranda made by Mr. Sickles, prior to 1861, in which twenty-five feet at grade is fixed as the ground taken; for at the west end of the Goddard property, where the road is at grade, and where we find stones set on opposite sides, the distance between is ascertained to be about thirty-three feet.

He seems to have accepted the fence at the west end as the boundary, as the stones there were set directly in its line; at the east end the stone was set some two feet two inches farther into the field.

Looking back over the facts of the case, we find in the original location and fencing, the change in the character of the fences by Morton, the relocation and setting of the stones by the Company, and the resetting and change in the character of the fence by Mrs. Goddard, four distinct, unequivocal, and consistent acts, all pointing in the same direction, and demonstrating that the land originally taken by the company did not extend beyond the line of these stones, to which at the east end, and back of which at the west end, about three feet, Mrs. Goddard has set her wire and iron fences.

There is only one thing that militates against this view. At the commencement of the road, the president and engineer seem to have had an idea that at some future time an additional track might be laid; and in 1853 they reported to the board that ground had been secured of sufficient width for a double-track road, twenty-five feet wide at grade, with the requisite side slopes at excavations and embankments. No doubt they so believed, and it may be possible that in some instance they could produce the evidence of what they said. Has this report any value as evidence?

Report of president that ground had been secured for double track.

Mr. Sickles, the engineer, says that he did not personally make any settlement of rights of way; and that his statement in the report, as to what had been secured in width in the making of such settlements, was based on what Mr. Rutter, the president, had told him.

Mr. Rutter is still living and within reach, but was not called before the master to show upon what ground he based his statements in the report.

Mr. Sickles's statement is wholly valueless; and the one made by Mr. Rutter was *ex parte*, was made after the act, was against the facts as they now appear; and, being without proof or notice to Longstreth or his successors in title, it is of no binding effect upon any one.

The map which Mr. Sickles says he made of the location of the road, and the notes or memoranda which he made prior to 1861, when he walked over the road with an assistant engineer, are subject to the same objection as is made to his statement in the report.

The map, so far as this case is concerned, was necessarily made upon information coming from the same source. In neither case does it appear that he acted from personal knowledge, or upon information obtained from original sources.

He simply put into form what he assumed had been done. As against the established facts of the case, none of these matters can have any weight; and the fact remains as before found.

It follows, therefore, that the plaintiffs are entitled to the relief prayed for; and the master is of opinion, (1), that the plaintiffs should have a decree restricting the Philadelphia & Baltimore Central Railroad Company, and the Philadelphia, Wilmington, & Baltimore Railroad Company, defendants, and the agents, servants, and persons in their employ, from entering on or occupying the said real estate or any part thereof, and from depositing stone, earth, or other material thereon, outside or beyond the present enclosed limit of the road-bed of the said defendants; and also from erecting or construct-

The master's opinion.

ing or widening said road-bed thereon, until security be given or damages assessed or secured as required by law ; (2), that the said defendants shall be decreed to pay the costs of this suit.

To this report, exceptions were filed by the West Chester & Philadelphia Railroad Company, defendant ; but the court overruled the exceptions, confirmed the report, and entered a decree in accordance therewith ; and this was the subject of the *assignments of error*.

John J. Pinkerton for appellants.

George E. Darlington and *John G. Johnson* for appellees.

PER CURIAM.—The report of the learned master in this case is unexceptional, and for the reasons which he has given we affirm the decree of the court below.

The decree is affirmed, and the appealed dismissed, at the costs of appellants.

No Inference of Additional Width can be drawn from Fact that Double Tracks are authorized. — *In re* petition of Shoenberger, 25 Am. & Eng. R. R. Cas. 177.

CENTRAL BRANCH UNION PACIFIC R. Co.

v.

ANDREWS *et al.*

(*Kansas Supreme Court, Jan. 7, 1888.*)

Eminent Domain. — **Admissibility of Statements as to Value of Property.** — In an action against a railroad company for damages caused to abutting property by the laying of its tracks through an alley, the statements introduced by defendant of the value of said property, made about the time of its appropriation, by the party whose administrator brings the action, are admissible.

ERROR to District Court, Atchison County ; W. D. Webb, Special Judge.

Rehearing Railroad Co. *v.* Andrews, 30 Am. & Eng. R. R. Cas. 352. This action was begun in the court below by R. S. Andrews, in his lifetime, in 1878, to recover damages from the railroad company for injury caused by the laying of its tracks through an alley to his property abutting thereon. This is the fifth time that it has been in this court. 26 Kan. 702 ; s. c.,

5 Am. & Eng. R. R. Cas. 370; 30 Kan. 590; s. c., 14 Am. & Eng. R. R. Cas. 248; 34 Kan. 564; 9 Pac. Rep. 213.

B. P. Waggener for plaintiff in error.

Hudson Tufts for defendant in error.

PER CURIAM. — With the declarations of the law, as stated in the syllabus filed with the original opinion filed in this case, we are fully satisfied. A re-examination of the record, however, convinces us that the trial court committed material error in refusing to permit the witness Challiss to testify as to the admissions made by Mr. Andrews, in his lifetime, as to the value of the lots in controversy. The alley back of his lots was appropriated by the railroad company about Aug. 1, 1887. There is evidence tending to show that there were brick houses upon the lots at the time of the appropriation of the alley. There is, however, no positive evidence in the record as to the time the houses were built. Mr. Challiss was asked:—

“Q. State if you had a conversation with Mr. Andrews, in his lifetime, in regard to this property? A. Yes, sir.

“Q. About when? A. I could not state. I guess it was before 1880. I won't say positively. It was just about the time he commenced building the brick house which is on the property.

“Q. Did you say 1880? A. I would not be positive.

“Q. You locate it with reference to the time he commenced building the brick house? A. Yes, sir.

“Q. Now state what that conversation was, if at all, to the market value of the property. [Objected to by the plaintiff; objection sustained; defendant excepting.]

“*Mr. Waggener.* — We now offer to prove by the witness the market value of that property as placed on it by R. S. Andrews, in his lifetime, about the time of the construction of the brick building, and shortly previous to the laying down of the track in the alley. [Objected to by the plaintiff; objection sustained; defendant excepting.]

“*By Mr. Waggener.* — We offer to prove by witness that shortly before the commencement of this action, and after the track was laid down in the alley, that he had a conversation with R. S. Andrews with reference to this property, and that Andrews then placed a valuation on the same. [Objected to by plaintiff as incompetent, and not being proper practice.]

“*By the Court.* — I think it is proper practice to make the offer in this way; but I think the evidence is incompetent, and I will sustain the objection for that reason. [Defendant duly excepting.]

“Q. State if you had a conversation with Andrews about this property. A. Yes, sir; after I came back from New York to remain here. I haven't been away from here since 1878.

"Q. State what that conversation was, and what R. S. Andrews stated to you about this property. [Objected to by plaintiff; sustained; defendant duly excepting.]

"Q. Were you in this city in 1876? A. Yes, sir; I was away for a year and a half (1875 and 1876), in 1876 up to September, 1876."

This action was originally commenced Sept. 13, 1878. It appears from the foregoing that the statements sought to be introduced were not only competent, but were material and important; therefore the judgment of the District Court should be reversed.

Admissions of Owner as to Value of Land taken.— See Central Branch Union Pac. R. Co. *v.* Andrews, and note, 30 Am. & Eng. R. R. Cas. 352-355.

COVINGTON SHORT-ROUTE TRANSFER R. CO.

v.

PIEL.

(Kentucky Court of Appeals, May 24, 1888.)

Eminent Domain.— Compensation to Owner.— Kentucky Constitution.— Under the Constitution of Kentucky, art. 13, sect. 14, providing that "no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him," a railroad company is not entitled to take possession of premises sought to be condemned upon execution by it to the owner of a bond, with surety with double the amount of damages assessed, conditioned to perform the judgment of the court, or any other court to which the case may be appealed; and an Act of the Legislature authorizing it to take possession of the land upon complying with these conditions is unconstitutional and void.

Same.— Elements of Damage.— When estimating the damages to be awarded to a person whose home and place of business had been condemned for a right of way by a railroad company, the jury may take into consideration the inconvenience and loss resulting to the owner from being deprived of his home and established place of business.

Same.— When Verdict will not be set aside as Excessive.— In proceedings to condemn land for a right of way for a railroad company, where there have been three verdicts fixing the damages at \$7,750, \$8,000, and \$8,250 respectively, the final verdict will not be disturbed in the absence of any evidence to show that either finding was excessive.

APPEAL from Circuit Court, Kenton County.

Proceedings instituted by the Covington Short-Route Transfer Railway Company against Christian Piel to condemn certain

property for a right of way. From the verdict of the jury assessing the damages plaintiff appealed.

Hallam & Myers for appellant.

William Goebel for appellee.

PRYOR, C. J. — This proceeding was had on the application of the appellant, the Covington Short-Route Transfer Railway Company, asking for the appointment of commis-

Facts.

sioners to assess the damages resulting from the condemnation of appellee's house and lot in the city of Covington for railway purposes. The commissioners appointed proceeded to value the property under the Act approved April 11, 1882, and assessed the damages at \$7,750, and, each party excepting to their award, a jury was impanelled in the county court, and a verdict rendered in favor of the appellee for \$8,000. The case was then carried by an appeal to the Circuit Court, and a verdict rendered for \$8,250, and is now in this court on an appeal from the Circuit Court. The appellant, the railway company, declining to pay or tender the amount of the judgment because it regarded the sum allowed as excessive, executed a bond, with security, to the appellee, in accordance with the seventh section of the Act of April 11, 1882, for double the amount of the damages assessed, conditioned to perform the judgment of the Circuit Court, or that of any court to which the case might thereafter be appealed, and on motion was awarded a writ of possession. The seventh section of the Act is as follows: "Upon the confirmation of the report of the commissioners by the county court, or the assessment of damages by said court as herein provided, and the payment or tender to the owners of the amount due as shown by the report of the commissioners when confirmed, or as shown by the judgment of the county court when the damages are assessed by said court, and all costs adjudged to the owner, the railroad company shall be entitled to take possession of said land or material, and to use and control the same for the purpose for which it was condemned, as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the county court by the railroad company, it shall not be entitled to take possession of the land or material condemned unless it shall execute to the owner a bond, with surety, to be approved by the county court, in double the amount of the damages assessed, conditioned to perform the judgment of said court, and of any court to which the case may thereafter be appealed, which bond shall be filed with the papers in the case." Gen. St. 1887, c. 18. When the case reached this court the appellee prayed a cross-appeal; and although a bond had been executed by the railway company, as provided by the seventh section of the Act of 1882,

was permitted by this court to execute a *supersedeas* bond, having the effect to stay the writ of possession until the case was disposed of on the appeal.

The right of the appellee to a *supersedeas* on his cross-appeal is one of the questions raised, and to be disposed of on the final hearing. It is insisted by the appellee that so much of the seventh section of the Act of April 11, 1882, as permits the railway company to take possession of his property, and apply it to the use of the company, upon the execution of a bond of indemnity only, is in violation of sect. 14, art. 13, of the Constitution, providing that "no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." While the statute does not, in express terms, deny to the owner the right to supersede the judgment in a case like this, it provides that the corporation, when taking the appeal, may take possession of the property upon executing a bond to the owner in double the amount of the damages assessed, excluding necessarily his right to prevent the public use by superseding the judgment, and thereby delay the progress of the work until the end of the litigation. This seventh section gives the right of entry upon the payment or tender of the money to the owner when the company proposes to abide by the judgment, and to afford the company a remedy by an appeal when it may deem the award of damages excessive. It further provides the execution of a bond, with surety, that the owner is compelled to accept if approved by the court, with the right to the company, after its execution, to enter and apply the property to its use. This latter provision of that section, the appellee maintains, is unconstitutional; and, if so, there is no reason why the *supersedeas* should have been withheld by this court. It is essential, in taking private property for public use, that compensation should first be made. "It is," says Mr. Mills, "in the nature of a compulsory purchase of the property of a citizen for the purpose of applying it to a public use;" and whether the corporation desiring that use can have the property valued, and then take it from the possession of the owner by executing a bond that may have the effect to reduce the value, and at the same time compelling the owner to risk the solvency of the parties to the obligation, is the question presented here. In considering this question, no reported case is to be found in this State where a private corporation has appropriated the property of the citizen to its use upon the execution of a bond containing a mere promise to pay the damages sustained, at the end of a litigation by which the value of the property is to be determined.

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stitutional.

This court has held, in more than one case where property was condemned for the benefit of the municipality or for county purposes, that, if the owner was made secure by the execution of a bond with surety, it was such a compensation as was contemplated by the Constitution. In the case of *Gashweler's heirs v. McIlvoy*, 1 A. K. Marsh. 84, the damages were secured by a direction to pay the sum allowed out of the county levy; in the case of *Jackson v. Winn*, 4 Litt. 325, the property was taken for an incorporated town; and in *Duncan v. City of Louisville*, 8 Bush, 98, the mayor was authorized to sell bonds to pay the value of the property condemned. There is a distinction recognized by many authorities between a taking by a municipal subdivision of the State and a taking by a private corporation. The reason given is, that in the one case the owner may resort to the public treasury of the State or the municipal government for his money, with the power in the State, if the treasury should be empty, to coerce, by taxation, a sum sufficient to make the compensation; while, as to a private corporation, the owner is compelled to risk the solvency of the parties to the bond, with no other remedy for the value of his property taken than a suit at law in the event of their failure to pay. This early doctrine, "that compensation need not precede the taking," was established, says Mr. Mills in his works on "Eminent Domain," for the reason that the property was taken mainly for the State, and the payment to be made out of public treasury. Whether or not this reason controlled the decisions of this court in the earlier cases is not now necessary to inquire; for it is manifest that a mere security in the bond of a corporation cannot be regarded as just compensation previously made the owner, within the spirit and meaning of the bill of rights. That the citizen would be more likely to receive compensation from the State out of an abundant treasury, and by reason of its power to enforce payment by exactions from its citizens in the form of taxation, than from a private corporation owning its corporate property, or the individual security given by it, will be readily conceded; but in what manner this protects the citizen who has been deprived of his property in his constitutional rights it is difficult to comprehend. The security may be more ample in the one case than in the other, and still his right of property has been destroyed in its appropriation to a public use without just compensation previously made; and all that is left him, whether due by the municipality, county, or corporation, is the right, if a voluntary payment is not made at the end of the litigation, to take coercive measures for the recovery of the value of his property, to which he was clearly entitled, from the municipality or the private corporation before either could use it for public purposes. Viewed in any aspect of the case,

whether taken by the sovereign or by the corporation under sovereign authority, it is a destruction of the constitutional guaranty for the protection of private property to appropriate it, without the consent of the owner, to a public use, without first making compensation to him in money for the value of the property of which he has been deprived. We are aware that, in the condemnation of private property for the construction of railroads, serious injury might often result to the public by a delay in the progress of the work until the question of compensation is determined by litigation. The necessity for an immediate entry in all such cases is apparent. Still, it could not have been intended by the framers of the Constitution that a security for payment should be deemed equivalent to payment in fact. That just compensation previously named authorized the corporation, under legislative authority, to take private property upon a credit, by executing a bond payable at the end of a litigation, is a doctrine that cannot be sanctioned by this court. The language of the bill of rights does not admit of such a construction.

In this case the homestead of the owner had been condemned; and the appellant, not satisfied with the assessment of damages, is permitted, by the Act of 1882, to take possession of his dwelling, his business-house, and the lot upon which they stand, with no other compensation than the bond of the company, that may or may not be paid when the litigation terminates. He may be compelled to sue on the obligation to recover the compensation that the Constitution in express terms provides he shall have before his property is taken. If the bill of rights provided that the citizen should be made secure before his property could be appropriated to public use, there might be some reason in requiring him to look to a bond of indemnity for his compensation; and the earlier cases seem to have proceeded on the idea that this security was what had been guaranteed to the citizen, and nothing more, when it is plain, we think, from the language used in that instrument, that just compensation, previously made, means the payment in money to the owner of the value of his property, whether for the sovereign, a municipality, county, or corporation, before it can be taken from him. When the damages are assessed under the Act of 1882, the money may be paid or tendered to the owner; and if he declines to receive it, his own act entitles the company to enter and appropriate the property condemned for the public use. "The Legislature might as well declare a bond to be good compensation at the end of the condemnation proceedings as at the beginning; hence possession cannot be given simply on an offer to give or on the giving of a bond." Mills, *Em. Dom.* (2d ed.) sect. 136. Mr. Cooley, in his work on *Constitutional Limitations*, says, "It is not competent to deprive

him [the citizen] of his property, and turn him over to an action at law against a corporation, which may or may not prove responsible, and to a judgment of uncertain efficacy." Const. Lim. 562. This court, in the case of *Arnold v. Bridge Co.*, 1 Duv. 372, speaking through Chief Justice Robertson, said, "But the Constitution constructively requires an impartial assessment, by a judicial process, of the actual value in money, and full payment, before private property shall be appropriated to public use." Authorities might be given sustaining a like construction of constitutional provisions similar to ours; and to require the citizen to look to a mere written promise to pay the compensation to which he is entitled, is, in our opinion, a perversion of the plain meaning of the bill of rights.

Objections were made in the court below to an instruction given at the instance of the appellee, and also exceptions taken to the refusal of the court to give instructions asked by the appellant. The court told the jury they "must find from the evidence the real value, in money, to the owner, of the premises as they were actually situated on the 12th of July, 1887; and they will find for the owner the value aforesaid." The appellant asked the court to say to the jury that they should not take into consideration any consequential injury or inconvenience to the defendant in the taking of his property. The last instruction the court refused to give, but gave the instruction asked by the appellee. The appellee owned no property adjacent to the property condemned; and the damages he sustained, if any, in addition to the value of the property taken, was the inconvenience and loss resulting from his being deprived of his home and place of business: and to say that no such facts should enter into the estimate of value would be unjust to the owner, and place him in a condition where he had sustained actual injury other than the mere market value of his property, without affording him any remedy for the wrong. This character of case is unlike an appropriation of a strip of land where the mere market value is the criterion, — the taking working no other injury. Here the owner and his family have been deprived of their homestead; his place of business taken from him; and to allow him simply what such property is worth or would bring in the market would not compensate him for the injury sustained. The instruction for the appellee was proper; and, while the jury might have been told that a mere ideal value placed on the premises by the owner should not control them in their verdict, yet it is evident that, in ascertaining the damages, the value of his home and business-house to the owner, under the circumstances, should have entered into the estimate. It is not certain, however, from this record, that the jury did more

**Compensation.
Elements of
damage.**

than to give the owner the marketable value of his premises. The witnesses for the railway company fixed the market value at \$5,000 to \$7,000. Those for the appellee fixed the market value as high as \$9,361. The jury returned a verdict of \$8,200. The appellee was allowed to show, that, in addition to the market value proven, he had sustained other loss, in having to abandon his place of business, to the extent of \$2,000 or \$3,000. We perceive no objection to this testimony. The location of appellee's business-house, its convenience for his labor and those who patronized him, were facts tending to enhance the value of the property to the appellant, and of which he ought not to have been deprived.

There have been, in effect, three different verdicts in this case fixing the value of appellee's property. The commissioners fixed the value at \$7,750, the jury in the county court at \$8,000, and the jury in the Circuit Court at \$8,200. Verdict not disturbed.

After so many findings on the one issue, with such a small difference in each verdict, we see no reason for disturbing the judgment, in the absence of any evidence tending to show that either finding was excessive.

The only question made by the appellee on his cross-appeal was his right, as the company had appealed, to supersede the writ of possession. This he was allowed to do; and, perceiving no error to the prejudice of the appellant, the judgment is now affirmed with damages. No reversal is asked on the cross-appeal.

Payment or Tender of Compensation as Prerequisite to Entry.—What Amounts to Payment or Tender.—See *Redman v. Philadelphia, etc., R. Co.*, 1 Am. & Eng. R. R. Cas., and note, 1-5; *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 1 Ib. 12; *Northern Pac. R. Co. v. Burlington & M. R. Co.*, 1 Ib. 8; *Chambers v. Cincinnati, etc., R. Co.*, 10 Ib. 376; *St. Louis, etc., R. Co. v. Karnes*, and note, 10 Ib. 39-43; *Prather v. Western Union Tel. Co.*, and note, 14 Ib. 1, 18; *United States v. Oregon R. & N. Co.*, 14 Ib. 23; *Jones v. New Orleans, etc., R. Co.*, 14 Ib. 217; *Kanne v. Minneapolis, etc., R. Co.*, 14 Ib. 308; *Lake Erie, etc., R. Co. v. Kinsey*, and note, 14 Ib. 309-315; *State v. Jacksonville, etc., R. Co.*, and note, 17 Ib. 15, 25; *White v. Wabash, etc., R. Co.*, and note, 17 Ib. 82, 86; *Louisville, etc., R. Co. v. Quinn*, 22 Ib. 111; *St. Louis, etc., R. Co. v. Evens*, and note, 22 Ib. 517-531; *Low v. Concord, etc., R. Co.*, 25 Ib. 199; *Pennsylvania R. Co. v. Angel*, 26 Ib. 359.

When Verdict of Jury in Condemnation Proceedings will be set aside as Excessive.—See *Clarke v. Chicago, K., & N. R. Co.*, *ante*, p. 156; *Little Rock, etc., R. Co. v. Woodruff*, *ante*, p. 169; *Calumet River R. Co. v. Moore*, *ante*, p. 180.

Consideration by Jury of Risk of Fire, in estimating Damages.—Where, from the evidence, it is apparent to the jury that maintaining and operating a railroad near buildings increases the risk, the jury may, though no witness has testified directly that it will, consider such risk, in estimating the damage to the land on which the buildings stand. *Johnson v. Chicago, B. & N. R. Co.* (Minn.), 35 N. W. Rep. 438.

Diversion and Pollution of Stream.—On the trial of a proceeding by a railroad corporation to condemn a right of way through a farm, involving

damage to the farm by the diversion of a stream claimed by defendant to have been useful for stock-watering purposes, evidence for plaintiff that the stream had, from pollution, become worthless for such purposes, is competent as showing the nature and condition of the stream, though the pollution was the wrongful act of a third person. And, in such case, it is for the jury to say how long the pollution will continue. *Kiernan v. Chicago, etc., R. Co.* (Ill.), 14 N. East. Rep. 18.

Damage accruing since Award.—On an appeal from assessment of damage done to a farm by reason of the appropriation of a right of way through it by a railroad company, and where it is shown at the time of the trial that the railroad is completed across the farm, it is then competent and proper to assume that the railroad was constructed as contemplated at the time of the condemnation proceedings; and all damage that is apparent which will result in injury to the farm, such as stopping the flow of surplus water, forming stagnant pools along the side of or on the right of way, and the like, are elements of damage proper to go to the jury. *Wichita & Western R. Co. v. Kuhn* (Kan.), 16 Pacific Rep. 75.

Instruction as to Remote Damages.—An instruction to a jury in the following form: "In assessing the damages to the market value of the property not taken, you should not take into consideration any thing as an element of damages which is remote, or imaginary, or uncertain, or speculative, even though mentioned or testified about by witnesses; but the only elements which you should take into consideration as tending to reduce the market value are those which are appreciable and substantial, and which will actually lessen the market value of said property,"—does not submit to the jury the question of law what damages are remote, imaginary, uncertain, or speculative. *Kiernan v. Chicago, etc., R. Co.* (Ill.), 14 N. East. Rep. 18.

Owner of Land not entitled to its Value as enhanced by Improvements placed thereon by Company under Mistake as to Title.—Where a railroad company, under agreement with one in possession of land under a mortgage lien, and other claims apparently valid, and supposed to equal the value of the property, was to receive the deed as soon as the lienor's title was perfected, and in good faith took possession, built its road-bed, side-tracks, depot-buildings, stock-yards, etc., and another was afterward discovered to have the superior title, on proceedings by the company to condemn the property, the owner was not entitled to its value as enhanced by the improvements. *Ellis v. Rock Island, etc., R. Co.* (Ill.), 17 N. E. Rep. 62. See also *Hendry v. Trinity & Sabine R. Co.*, and note, 24 Am. & Eng. R. R. Cas. 286.

Unauthorized Construction of Track on Another's Land.—**Right to remove Materials used.**—In *Preston v. Sabine, etc., R. Co.* (Tex.), 7 S. W. Rep. 825, it was held that where a railroad company enters on land, and constructs its road over it without acquiring a legal right to do so, the materials used in its construction do not become the property of the land-owner; but the company may remove them, and will not be liable as for a conversion. The court said, "The question as to the right of a land-owner, when a railroad has been constructed on his land without his consent, or without first in some way acquiring the right to the railroad, or the material that enters into its structure, has arisen in many cases, in some of which it arose in determining the elements of damages the land-owner was entitled to have considered in proceeding instituted to condemn the right of way subsequently to the construction of the road. The manner in which the question has arisen cannot, however, affect the question of right or title to the material used in the construction of the road. If, when placed on land without right, it becomes the property of the land-owner, it can no more be taken from him and applied to a public use without compensation, than can the land on which it is placed. The question was considered by the Court of Appeals of this State in the case of *Railroad Co. v. Hays*, 5 Tex. Law Rev. 771; and it held that a railway constructed

on land without right to do so did not become the property of the land-owner. The reasoning of the court in that case seems to us correct, and in accordance with the great weight of authority. *Justice v. Railroad Co.*, 87 Pa. St. 28; *Morgan's Appeal*, 39 Mich. 675; *Dietrich v. Murdock*, 42 Mo. 279; *Lyon v. Railway Co.* 42 Wis. 539; *Railway Co. v. Canton*, 30 Md. 354; *Railroad Co. v. Armstrong*, 46 Cal. 90; *Railway Co. v. Dunlap*, 47 Mich. 456; s. c., 5 Am. & Eng. R. R. Cas. 378; *Railroad Co. v. Railroad Co.*, 7 Pac. Rep. 123; *Hendry v. Railroad Co.*, 24 Am. & Eng. R.R. Cas. 287; *Daniels v. Railroad Co.*, 41 Iowa, 52; *Wayner v. Railroad Co.*, 22 Ohio St. 576; *Jones v. Railroad Co.*, 70 Ala. 228.

The time at which this court will adjourn for the term is so near at hand that we cannot now review the cases bearing on the question, or discuss the principles asserted in them; but it is sufficient to say that we recognize the correctness of the rulings made in them, and regard them as decisive of the correctness of the rulings of the court below. The judgment will therefore be affirmed."

BURLINGTON, KANSAS, & SOUTH-WESTERN R. CO.

v.

JOHNSON.

(38 *Kansas*, 142.)

Right of Way over Public Land. — The Act of Congress of July 26, 1866, which declares that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted," does not include railroads within its intent.

Homestead Entry. — Possession. — Equity. — A settler on the public lands of the United States who makes a valid homestead entry, and continues to reside on and improve the land entered, in compliance with the land laws, has the exclusive right to its possession and use, and to the improvements made thereon; and he also acquires equities in the land itself which increase from the time the entry is made until the complete title is earned.

Right of Way. — Condemnation. — Compensation. — Such a settler may sell and transfer a portion of his homestead for a right of way for a railroad, or his interest therein may be condemned and appropriated for such purpose upon adversary proceedings, and by paying full compensation to the settler therefor.

Homesteader. — Nature of Damages. — A homesteader who has entered, and is proceeding lawfully to perfect his title to the land entered, suffers an injury by the building of a railroad over his homestead, which differs only in degree from that sustained from the same cause by one who has the complete title.

Liability for Injury. — A railroad company which enters upon a homestead, and constructs a road thereon without the settler's consent, and without making just compensation, is liable for the injury thereby done to his interest; the extent of which injury is for the jury to determine.

ERROR from Phillips District Court.

W. H. Johnson brought an action in the District Court of Phillips County, alleging, in substance, that he was the occupant and in actual possession of a quarter-section of land in that county under the homestead laws of the United States, and which he had continuously occupied as his homestead, and had cultivated it as a farm. He averred that the Burlington, Kansas & Southwestern Railroad Company, without his consent, wrongfully entered upon and constructed a line of railroad over the land, and had wrongfully appropriated a portion thereof without in any way compensating him for the injury done. The answer of the railroad company was a general denial. A trial was had at the April term, 1886, with a jury, and testimony was offered to the effect that Johnson was twenty-six years of age, a citizen of the United States, and entitled to the benefit of the homestead laws of the United States; that on the 19th day of July, 1882, he made a homestead entry on the land in question, and with his family had resided upon and cultivated the land since that time; that he had built a house and stables, dug two wells, and broken and put in a tillable condition thirty-five acres or more of the land; that in June, 1885, the railroad company constructed its road across the land, and appropriated thirteen and nine-tenths acres; and that, on account of the character of the land, deep excavations and high embankments were made in building the road. It was built in front of the house and stable, the centre of the tract being only two hundred and twenty-three feet from the house, and about three hundred feet from the stable; and by reason of deep cuts and high fills and banks, the house and stables were cut off from the timber and water on the other side of the road. There was testimony that the market value of the right of Johnson to the possession and use of the land under his homestead entry was worth at the rate of from seven to twelve dollars per acre for the land taken, and that the portion not taken was depreciated in value from two hundred to more than six hundred dollars.

The court gave the jury the following charge:—

“1. This is an action for damages, brought by the plaintiff against the defendant, on account of the taking and appropriating of a right of way embracing thirteen and nine-tenth acres of land, over and across a quarter-section of land, situate in said county and State, and described as follows; to wit, the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section four, and the northwest quarter of the northeast quarter and the northeast quarter of the northwest quarter of section nine, township one south, range nineteen west, containing one hundred and sixty acres. The plaintiff

claims to be entitled to damages for the taking of such right of way by virtue of a homestead entry on said land made July 19, 1882, by him, and his subsequent compliance with the United States laws in relation to acquiring title to the public lands. Under the homestead laws of the general government, a person who is twenty-one years of age, and a citizen of the United States, and who has not had the benefit of the homestead laws, is qualified to make a homestead entry on not to exceed one quarter-section of the public domain ; and if the entryman subsequent to such entry continues to reside upon and cultivate his entry, and does not at any time abandon his homestead entry, for a longer period than six months, he may, after five years of continuous residence and cultivation, prove up under his entry, and obtain a patent for the land from the Government. The entryman under the said homestead laws by such entry and subsequent residence and cultivation acquires the right of possession of the land embraced in his entry, the right to use of the same (including the right to grass and a sufficient amount of the timber growing thereon, if any, for firewood, and in the improvement of the land), the right and ownership of all improvements put upon the land, and the right to acquire a full legal and equitable title thereto. By the act of putting on his homestead entry, the entryman acquires the exclusive right, by continuous residence and cultivation of the land, to obtain the full legal title ; and his equities increase from the time of his entry to the expiration of the five years provided for in the Government land laws ; and if at the end of five years he has complied with the said laws in all particulars, and there is no valid adverse prior claimant, the Government issues to him a patent for the land.

“2. If you find from the evidence that the plaintiff had a valid homestead entry on the land above described, within the meaning and as explained in the first instruction, at the time of the taking of a right of way, amounting to thirteen and nine-tenths acres across said land (the taking of which is admitted by defendant), and that the same have been damaged by reason thereof, and that such damages have not been paid or settled for, you may then take in consideration the following matters or elements as a basis for fixing the amount of such damages : First, the market value of the possession and use of the strip of ground containing the thirteen and nine-tenths acres taken by the defendant for the right of way at the time of the taking, in June, 1885. In this connection you will remember that the company only acquires the perpetual right to use the right of way in the operating and maintaining of its roadway ; and that the ultimate fee remains in the land-owner, and he can use the right of way for every purpose not incompatible with, and which does not inter-

with, the use thereof, of the defendant in the operating and maintaining of its road. Second, the difference between the actual market value of the right of possession, use, and improvements in the remaining one hundred and forty-six and one-tenth acres immediately before the taking of the right of way and immediately thereafter. Third, seven per cent interest on the amount of damages to the land (if you find from the evidence that it was damaged) from June 29, 1885.

" 3. In arriving at the amount of damages done to the plaintiff's interests in said tract of land, if any, you are not to make any allowance for any enhancement of the value thereof, if any, growing out of a knowledge on the part of the people or public in the vicinity of the land that defendant was about to construct a railroad through the neighborhood in which the land is situated. You have a right, and it is your duty, to take into consideration the physical characteristics of the land described in the petition, the uses to which it was put, and, from the nature of things, is suitable for; the course of the railroad across the land; the shape the remaining portion of the land is left in; the convenience or inconvenience of using the portion not taken for the purposes for which the land is used; and the increased liability, if any, of accidental fires from passing trains. On the whole, you may take into consideration all incidental loss, inconvenience, and damage, present and prospective, which may be known, or may reasonably be expected to result from the construction and operation of the railroad, in a legal and proper manner.

" 4. The difference between the fair market value of the property taken as it was before and after the taking, not the estimate derived from fancy local attachment, or otherwise, which the owner may put upon it; or, on the other hand, the price which it would bring at a forced sale, is the true measure of the owner's consideration. The use to which the right of way is to be put may be considered, but annoyances which do not differ in kind from those suffered by the community in general are not to be taken into consideration. The market value is meant that price at which a similar property is generally sold at the time and in the vicinity of the property in question. You are the exclusive judges of the evidence, of what it proves or disproves, and of the credibility of witnesses. In arriving at the weight that ought to be given to the testimony of any witnesses who had testified in this cause, you can take into consideration the interest such witnesses may have, if any, in the result of this case, his disposition to tell the truth, opportunities for knowing about the matters and things about which he testifies, and his demeanor while on the witness stand. This case should be tried and determined by you the same as an ordinary case between

private parties, and without any reference to the fact that a private person is plaintiff and a corporation is defendant."

The jury returned a verdict in favor of Johnson, fixing the amount of his damages at \$454.25 ; and also answered special questions that were submitted, as follows : —

" Q. 1. Do you find from the evidence that the plaintiff, W. H. Johnson, had a valid homestead placed on the land in question on July 19, 1882 ; and was plaintiff over the age of twenty-one years at the time he homesteaded said land ; and has plaintiff complied with the homestead law ? A. We do.

" Q. 2. Has plaintiff at all times since used said land, and cultivated the same for agricultural purposes ? A. Yes.

" Q. 3. What was the market value of the use and possession of the thirteen and nine-tenths acres of land appropriated by defendants for their right of way over said land ? A. \$139.

" Q. 4. What was the actual market value of the use and possession of said land as an entire tract just prior to the location of said railroad ? A. \$1,168.80.

" Q. 5. What was the depreciated market value of the right of use and possession of the remaining $146\frac{1}{10}$ acres, if you find there was depreciated market value on account of location and operating said railroad over said homestead ? A. \$293.20.

" Q. 6. What amount of interest do you find that plaintiff is entitled to recover on said sum ? A. \$23.05."

A motion to set aside the findings of fact and the verdict of the jury, and to grant a new trial, was overruled by the court, and judgment was given in favor of the plaintiff for \$454.25. The company has removed the case to this court.

W. W. Guthrie, J. W. Dewcese, and Pratt & Lewis for plaintiff in error.

George W. Stinson for defendant in error.

JOHNSTON, J. — There is but little controversy regarding the facts of this case. Johnson entered the land as a homestead, on July 19, 1882, and he had complied with all the conditions of the Act of Congress respecting the acquire-
Facts.
 ment of title, excepting that he had not resided on and cultivated it the full period of five years. The improvements which he had made were of a substantial character. His residence thereon had been continuous from the time of entry, and by continuing to meet the requirements of the homestead law for about a year after the trial, and by making final proof, he would be vested with a full and complete ownership in the land, and entitled to a patent therefor. The railroad company constructed its road without his consent, and without making, or offering to make, compensation to him for the damages done. It may also be fairly said that in

the view we take, the damages allowed by the jury were not exorbitant. The principal point in controversy is in respect to the measure of damages to which Johnson, being a homesteader, was entitled. The railroad company contends that because he holds under a homestead entry, and has not as yet acquired the full legal title, he is entitled to recover nothing beyond the mere injury done to the improvements which he had placed on the land. We cannot agree with this contention. The claim is based mainly on an Act of Congress of July 26, 1866, which de-

**Right of way
for construc-
tion of highway
does not in-
clude railways.**

clares that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted" (Rev. Stat. U. S. § 2477). It is argued that railroads are highways within the meaning of this provision, and that the plaintiff took his homestead subject to the right of the railroad to appropriate a right of way over the same without any compensation for any value of the soil or damages otherwise than to his improvements. The term "highway" used in the section quoted, does not, in either its ordinary or its strict sense, include railroads. It is true that in a certain sense a railroad is a public highway, to be constructed and operated according to law, and subject to public control. It can only be used, however, in a particular manner; and is not open to common use for foot passengers, horse passengers, animals, and carriages, as an ordinary highway may be used. In the usual understanding, a highway is one which is common to all people without distinction, and which they may travel over on foot or horseback, or in carriages (Thompson on Highways, 1; Angell on Highways, 3). A railroad and a common highway are essentially different in regard to construction, control, and use, as well as ownership, and the distinctions are so well understood that a mention of them is unnecessary. It is a familiar rule of law that in interpreting statutes, words and phrases are to be taken in the ordinary sense and common acceptance, unless it appears from the context of the Act that a different meaning was intended. We discover nothing in the provision in question, or in the subsequent legislation of Congress, which indicates that an unusual meaning was attached to the word, or that it included railroads. Instead of that, we find that since the law in question was enacted, Congress has deemed it necessary by both general and special acts, to grant a right of way to railroads over the public domain. Aside from several special acts, a general one was passed on March 3, 1875, granting to any railroad the right of way through any public lands of the United States. It provided at length the conditions to be observed, and the steps that were to be taken in order to secure the benefit of the Act. No reference is there made to the Act

of 1866, but Congress, as well as those who were instrumental in obtaining the legislation, seem to have proceeded upon the theory that the Act of 1866 did not grant a right of way for railroads (18 Stat. at Large, 482). On March 3, 1873, another Act was passed by Congress, which indicates to some extent the legislative understanding of the Act of 1866. It was then provided that a settler on the public lands, either by virtue of the pre-emption or homestead law, shall have the right to transfer by warranty against his own acts, any portion of his pre-emption or homestead for the right of way of railroads across such pre-emption or homestead (Rev. Stat. U. S., § 2288). Neither of these enactments purports to modify or repeal the Act of 1866. It was wholly unnecessary for Congress to grant a right of way to railroads, or to provide that a settler may convey his interest in a pre-emption or homestead for such purpose, if the Act of 1866, already in force, embraced railroads within its intent. It is true that the case to which we are referred, *F. & P. M. Railway Co. v. Gordon*, 41 Mich. 420, holds that railroads are highways within the meaning of the Act of 1866. The court, in that opinion, concedes that when the term "highways" is used in legislation, the common highways of the country are generally to be understood. The construction that railroads were intended was based on the apparent liberal policy pursued by Congress in encouraging railroads to build through the new and unsettled portions of the country. The court, however, expressed doubt in regard to the conclusion which it reached, and it does not appear that its attention was called to the subsequent general legislation of Congress expressly granting a right of way to railroads. An examination of the Congressional legislation on the subject, and having in mind the rule of interpretation that the usual meaning is to be given to words in the statute, unless another is obviously intended, we have come to the conclusion that only the common highways of the country were intended to be included in the term used in the Act of 1866. It is not claimed that the railroad company has complied with the requirements of the Act of 1875 to secure a right of way across the land in question; and if it had, the question would still remain, whether the land which had been entered under the homestead law would be treated as public land, liable to be embraced within, and to be conveyed by, a general grant. Under the rulings of the land department of the government, "a valid homestead entry operates as an appropriation and reservation of the land embraced in the same, so long as it remains in force and uncanceled. The entry while in force segregates the tract from the mass of the public domain" (*White v. H. & D. R. R. Co.*, 2 Copp's U. S. Public Land Laws, 1882, p. 878; *Wilcox v. Jackson*, 13 Pet. 516;

Witherspoon v. Duncan, 4 Wall. 218; Opinion of Attorney-General McVeigh, 1 Copp's U. S. Public Land Laws, 1882, p. 388). But whether or not it is so segregated by settlement and entry, we agree with the learned judge who tried the case, that the homesteader has an interest in the land beyond the bare improvements placed thereon, and which cannot be appropriated by a railroad company without making just compensation. It is true that he has not a legal title, and may never acquire it, but when he makes a *bona fide* settlement and a valid entry of the land, he acquires an immediate interest to the entire tract which gives him the right of possession; and upon making proof of settlement and cultivation for a period of five years, he becomes invested with full and complete ownership. As the court below remarked, "the entry-man acquires the exclusive right, by continued residence and cultivation of the land, to obtain the full legal title; and his equities increase from the time of his entry to the expiration of the five years." In the act granting to railroads the right of way through the public lands of the United States, Congress recognized the possessory claims and interest of settlers upon the public lands, and provided for their condemnation for the right of way of railroads (sect. 3 of Act March 3, 1875, 18 Stat. at Large, p. 482). In § 2288, Rev. Stat. U. S., it is enacted that —

Homestead
entry. Pos-
session.
Equity.

"Any person who has settled, or hereafter may settle, on public lands, either by pre-emption or by virtue of homestead laws, or any amendments thereto, shall have the right to transfer by warranty against his own acts, any portion of his pre-emption or homestead . . . for the right of way of railroads across such pre-emption or homestead; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their pre-emptions or homesteads."

This enactment indicates the view taken by Congress with respect to the interest acquired by the settler. It contemplates not only that he owns the improvements, but that he has an equity in the land itself, which he may transfer for a right of way; and it provides how that transfer may be made. It further recognizes that, until this equity is obtained, by purchase or otherwise, the right of the railroad company to enter and appropriate any portion of the homestead for a right of way is incomplete. It is conceded that the defendant in error had made a valid homestead entry, which gave him a preferred right thereto against every individual or corporation, so long as he made compliance with the laws of the United States in regard to the perfecting of his title to the land. It gave him the exclusive right of possession, the right to all the grass and crops grown on the

land, to a sufficient amount of the timber, if any was growing thereon, for firewood, and in the improvement of the land, and, by continuous habitation and improvement for a year longer, the right to the full, legal, and equitable title to the land. Under the laws of the United States, and the rules of the land department, the entryman is entitled to commutation in several forms, and to certain preference rights, and may also relinquish and sell his improvements and equities in the homestead to another. The relinquishment must, of course, be made to the United States ; but under the rules and practice of the land department it may be made so as to fully protect the transferee, if he be a qualified person, to the same right which his vendor enjoyed. With all these rights, the equities of the homesteader are very important and valuable. They constitute a property right, which appears from the testimony to have a well understood value in the district where the land in question lies, and is worth but little less than the full title to the land. The crops grown upon the land, as well as the improvements placed thereon, belong exclusively to the settler ; and if he has a valid entry, and has made the required improvements, he is safe in his possession, and in the ownership of the improvements, and can rest assured that, by continuous residence and compliance with the law, he can obtain the complete title. Indeed, there is an advantage in allowing the legal title to remain in the United States, which is frequently availed of by settlers who, upon making final proof, would be entitled to a patent. Until the equitable title and right to a patent is complete, the lands are not subject to state or local taxation, and the final proofs need not be made until seven years after the entry is made. It has been held by this court that the relinquishment of a homestead claim, and the transfer of the interest of a homesteader, are a sufficient consideration for a promissory note given in payment of such relinquishment and transfer. *Moore v. McIntosh*, 6 Kas. 39. Attorney-General McVeigh, in an opinion given to the secretary of war, in 1881, held that a claim of a homesteader to public land, was initiated by an entry of the land, which was effected by an application of the settler accompanied by the required affidavit and the payment of the commission. He said : —

“It is true, a certificate of entry is not then given ; the certificate being, under sect. 2291, Rev. Stat. U. S., withheld until the expiration of the five years from the date of such entry, at the end of which period, or within two years thereafter, upon proof of settlement and cultivation during that period, and payment of the commissions remaining to be paid, it is issued ; but upon entry the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his

part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership); and until forfeited by failure to perform the conditions it must, I think, prevail not only against individuals, but against the government. That in contemplation of the homestead law, the settler acquires by his entry an immediate interest in the land, which for the time being at least, thereby becomes severed from the public domain, appears, from the language of sect. 3297, Rev. Stat., wherein it is provided that in certain contingencies 'the land so entered shall revert to the government.' " (1 Copp's U. S. Public Land Laws, 1882, p. 388.)

The interest which the settler has, may be appropriated for a right of way by adversary proceedings, as we have already seen that Congress has provided for the condemnation of a right of way through a homestead, as well as for its purchase from the settler. Of course the settler does not part with the same interest or value that he would if he had the legal title, and he should only receive compensation for the interest taken from him.

**Right of way.
Condemnation.
Compensation.**

The court below, however, in its charge and rulings on the admission of testimony, seems to have carefully restricted the jury to an allowance for the injury done to the rights and interest which the settler had in the land. The appropriation and use of a strip of land through the homestead affected the entire tract. The homesteader had taken and was using it as a single tract, and as his home and farm. The division of the farm into parts of irregular shape, the deep cuts and high fills that were made, and the inconvenience resulting from the construction of the road, constitute an injury to the interest of the settler, which differs only in degree from that sustained by one who has the legal title. The property is taken at the instance and for the benefit of a railroad company, and the injury is occasioned by the company.

**Homesteader.
Nature of
damages.**

**Railroad company.
Liability for injury.**

The extent of the injury is for the jury to determine, and for which the railroad company is liable. We think the case was fairly submitted to the jury, and that the verdict and judgment given are just. The judgment will be affirmed.

All the justices concurring.

Rights of Railroad Company entering on Land of Settler under Homestead Law.—A settler who has entered public land of the United States under the provisions of the homestead law, although no patent has been issued, has an inchoate title to the land, which is property. This is a vested right,

which can only be defeated by his own failure to comply with the conditions of the law. If he complies with these conditions he becomes invested with full ownership, and the absolute right to a patent. As against such homesteader the railroad company has not, under the Act of March 3, 1875, a right of way over the land, unless such right was acquired by compliance with the provisions of the Act before the date of his settlement. *Red River, etc., R. Co. v. Sture*, 32 Minn. 95.

Justice Mitchell, in delivering an opinion to the court, said, "It follows that there was no error prejudicial to the railroad company in the charge of the court that Sture had certain rights in this land as a homesteader under the laws of the United States, and that the jury were to determine to what extent these rights have been impaired by the construction of the road; and that if the value of these rights in the land was lessened by the construction of the road across this land, Sture would be entitled to recover the difference between the value of those rights as they would have been without the construction of the road, and their value is diminished by such construction. And for the same reason there was no error in refusing to instruct the jury that the measure of Sture's damages would not be the value of the land so taken, but simply the damage to his possession. As this was the only portion of the charge excepted to, this appeal raises no question as to whether the court afterwards correctly instructed the jury as to the basis upon which the value of Sture's interest in the land was to be estimated, and the amount of his damages ascertained. But we might remark, that inasmuch as the homesteader had a right to the land in the condition in which it was when he entered it, and to all improvements which he has put upon it, and as he will have to perform the same conditions, in order to get his patent, as if no part of the land had been taken for the purposes of this road, practically the amount of his damages would be the same as if he was the owner in fee."

Title acquired by Railroads in Right of Way. — In *St. Onge v. Day* (Colo.), 18 Pac. Rep. 278, it was held that the owner of land through which a railway company has the right of way, actually in use for railway purposes, cannot himself use such right of way, or recover for trespasses committed thereon by others; the railway company being entitled to the exclusive use thereof. The court said, "The appellee had no right to occupy this right of way with wood-piles, coal-kilns, and habitations. Neither could any one else so occupy it by right from him. It follows that appellee had no right of recovery for such occupation of this right of way. Upon this question, however, the authorities are not in entire harmony. A right of way for railway purposes, in its use, is necessarily more exclusive than a right of way of one farmer over the premises of his neighbor, or of the public in a highway. A grant of a certain number of feet over land for a right of way for railway purposes, in the nature of things, excludes other uses thereof; for the reason that other uses thereof cannot with safety be made adjustable therewith. According to the conception of Congress (sect. 1, c. 152, Supp. Rev. Stat.), this right of way was necessary, at least expedient and proper, for railway purposes, and was accordingly granted. In view of the great care and caution necessary to prevent fatal and destructive accidents in the operation of railways, a high degree of care and caution is required of those who control and operate the railways. In many of the States they are required to enclose such right of way with fences, so as to prevent the occupation thereof by any thing else liable to cause accident or injury; and it must be apparent that such requirement is promotive of safety in the operation of railways. Where the railway right of way crosses other ways, there a double use is necessary, and there extraordinary care is required; and yet fatal collisions and accidents still occur at such places by reason of such additional use. A railway right of way, as a general rule, necessarily carries with it an exclusive right for railway purposes; and necessarily excludes right in the owner of the fee to occupy

the same with wood-piles, coal-kilns, and the like. The character of the occupation of the right of way as stated, being conceded, it follows, as matter of law, that such occupation of the railway right of way was a trespass thereon, and unwarranted in reason and by the better authority. *Railway Co. v. Ward*, 4 Colo. 30; *Railroad Co. v. Potter*, 42 Vt. 265, 274; *Mills*, Em. Dom. §§ 208-210. Where the reason of the general rule announced does not exist, the rule of exclusive use for the railway does not apply, as in cases of a passage provided under the railway track for the use of the owner of the fee in passing to and from his lands, lying upon either side of the railway, when such passage thereunder is arranged so that, in such use of such passage, no conflict or interference with the use for railway purposes can occur. *Railway Co. v. Allen*, 22 Kan. 285, 293, 294. It should not be inferred from what has been said that the railway company has right to burden the property with any other or different use than that for which it was granted or acquired."

See also *Bailey v. Sweeney*, 30 Am. & Eng. R. R. Cas. 328; *Vermilyea v. Chicago M. & St. P. R. Co.*, 23 Am. & Eng. R. R. Cas. 108; *Pittsburg & L. E. R. Co. v. Bruce*, 10 Ib. 1, and notes; *Leavenworth, etc., R. Co. v. Paul*, 10 Ib. 490; *Prather v. Western Un. Tel. Co.*, 14 Ib. 1, and notes; *Pierce v. Boston & L. R. Co.*, 27 Ib. 359-366, and notes; *Ross v. Pennsylvania R. Co.*, 27 Ib. 367.

When Grant of Right of Way conveys Fee and not Easement. — Defendant, a railroad company, had legislative power to acquire property absolutely for other than mere right-of-way purposes. A deed to it was headed, "Deed of Right of Way." It recited a consideration of \$2,150, for which the grantors "hath given, granted, bargained, and sold; and by these presents do give, grant, bargain, and sell, to" defendant "so much of his lands in said county as is required for the use of the road of said company, as follows," containing 2.7 acres of land; "to have and to hold, to said grantees and their assigns, forever." Then came a covenant to warrant and defend the premises granted, and relinquishment of dower by wife. One description of boundary recites, "East edge of right of way." The land conveyed was not of uniform width. *Held*, to convey the fee and not an easement. *Ballard v. Louisville & N. R. Co. (Ky.)*, 5 S. W. Rep. 484.

Grantee of Quit-claim Deed after Railroad is Built, not entitled to Compensation. — The grantee in a quit-claim deed executed two years after a railroad company had taken possession of the land conveyed, and built their tracks thereon, takes no right to compensation, where the deed makes no reference to such taking or occupancy, nor to any recompense for the same. *Walton v. Green Bay, etc., R. Co. (Wis.)* 36, N. W. Rep. 10.

THORNTON

v.

SHEFFIELD & BIRMINGHAM R. Co.

(Alabama Supreme Court, May 15, 1888.)

Conditional Conveyance of Right of Way. — Where one executes an instrument binding herself to convey a right of way to certain persons on condition that they shall commence the construction of a railroad within three months, and complete it through certain counties within three years, time is of the essence of such agreement; and, upon failure to comply with these conditions, compensation may be recovered for such right of way.

Estoppel of Land-Owner to claim Damages. — One who permits a railroad company, without interference, to construct a railroad over his land, is not thereby estopped to claim compensation for the right of way.

APPEAL from Chancery Court, Colbert County; Thomas Cobbs, Judge.

The appellant, Ella Thornton, a married woman, by her next friend, filed a bill in chancery praying for compensation for the right of way used by the Sheffield & Birmingham Railroad Company, and also for an injunction until compensation was paid. The eighth ground of demurrer set up that complainant was estopped from making claim for compensation, by a written agreement set out in full in the opinion. Demurrer sustained on this ground, and complainant appealed.

Simpson & Jones for appellant.

J. B. Moore for appellee.

STONE, C. J. — The appellee railroad company surveyed its route, and had partially constructed its road, beginning at Sheffield, in Colbert County, and extending south-eastward towards Birmingham. When this bill was filed the road was completed, equipped, and in running order for a distance of 40 or more miles, in Colbert and Franklin counties, running through the lands of the female complainant, after noticed. On the eighth day of October, 1881, Mrs. Thornton, then Mrs. Henry, together with her husband, entered into an agreement, partly printed and partly written, a proper interpretation of which is necessary to a decision of this cause. This agreement was signed without witnesses; but was, on the day of its date, acknowledged and certified in form required to convey a homestead, and also to convey lands owned by a married woman. Code 1866, §§ 1790, 1802, 1894, 2508. The instrument was duly recorded in the proper office. We insert a copy of the contract, italicizing the written words so as to distinguish them from the printed matter. The contract is as follows: "Know all men by these presents, that whereas, Eugene C. Gordon of the State of Mississippi, and his associates of the States of New York, Georgia, Alabama, Mississippi, and Tennessee, propose to build a railroad from some point on the Alabama Great Southern Railroad, or from some point on the Memphis & Charleston Railroad, into or through the counties of Tuscaloosa, Walker, Winston, Marion, Franklin, Colbert, and Lauderdale, State of Alabama; and whereas, the building of said railroad would, in our opinion, enhance the value of our farming and timbered lands, and the production thereon; and whereas, the building and operating of said railroad would, in our opinion, become a convenience and advantage in various ways

Facts.

to our property and our labor, in furnishing facilities for transportation and more rapid communication to and from the markets of the country. Now, for and in consideration of any and of all these benefits and advantages which, in our opinion, would accrue to us from the building of said railroad, should the said Gordon and associates, within four months from this date, begin the work of surveying or locating or building said railroad, and shall, within three years from this date, so complete the said railroad, so as to have it in operation [to the] *through the counties above named*, [county lines between _____ and _____ counties]. Now, in that event, in consideration of the said benefits and advantages likely to accrue to us and to our property, as hereinbefore referred to, from the building of the proposed railroad, we, *Gus A. Henry* and *Ella W. Henry*, his wife, of the county of _____, State of Alabama, do hereby agree and bind ourselves, our heirs, administrators, executors, and assigns, to make unto the said Eugene C. Gordon and his associates, and upon the compliance of the said Gordon and associates with the terms of this contract [hereby vest the said Gordon and his associates with good and sufficient title to all the coal, iron, coal-oil, in or upon or in anywise belonging to the following described lands or real estate ; to wit], *we give the right for the said railroad to enter our plantation and go through the same in constructing the said road, free of charge, provided it does not interfere with the buildings.* [And in addition to the above-described real estate, we hereby bind ourselves and legal representatives to make good and sufficient titles, in fee-simple, to all the following described lands or real estate ; to wit., . . . together with the right to enter upon the said lands to prospect for said mineral substances, and to mine and utilize the same, if they so desire ;] also we hereby grant unto the said Gordon and his associates the right for road and railroads across our lands, free of charge, and the free use of timber necessary for railroad or mining purposes. It is expressly understood that any and all of the above-specified donations are to be made by the undersigned to aid the said Gordon and his associates in the construction of said railroad, in consideration of the benefits and advantages likely to accrue to us from the building of the same. It is further expressly and specially understood that no such deed to the lands as above described [or to the coal, iron, coal-oil, and other mineral interests owned by us, as above specified] is to be made as described in this instrument if the said Gordon and associates should fail to build such portion of the road, and do the work as is required by the terms of this instrument ; nor, on the other hand, the said Gordon and his associates shall not be held liable for damages should they fail to build said railroad. The object of thus deeding, or thus-

binding ourselves to deed, certain lands [and our coal, iron, coal-oil, and other mineral interests], on certain conditions, to the said Gordon and his associates, is hereby expressly declared to be to induce the said Gordon and his associates to build the said railroad, the consideration to the undersigned being the supposed benefits to accrue to us from the increased circulation of money along the said railroad line in building and operating the same, and the general benefits of our having increased railroad facilities, by which, in our opinion, we will be fully compensated for the said aid extended or to be extended by us in securing the same." Dated, and signed by Gus A. Henry and Ella W. Henry, with their seals. In framing this agreement a printed blank was used, which contained many words and stipulations not germane to the contract made, or intended to be made. We enclose in brackets such stipulations, sentences, phrases, and parts of the same, as we think should not be considered in the interpretation of the agreement actually made.

It is a rule of interpretation of deeds or other instruments, partly printed and partly written, that the written portions are presumed to have commanded the stricter attention of the parties ; and, if there is an irreconcilable conflict between them, the writing prevails over the printed matter. 2 Devl. Deeds, § 837 ; Bish. Cont. § 413. This is but the teaching of human experience crystallized into law. We are satisfied that in this case there was no intention to contract for mineral rights, or for any easement or privilege in connection therewith. The sole purpose was to obtain a right of way through the plantation of the female complainant, free of charge ; and, on like terms, "the free use of timber necessary for railroad purposes." The contract is not free from ambiguity. It is earnestly contended for appellee that time was not made of the essence of this contract. On the other hand, it is claimed for appellant that the writing is only an agreement to convey, on conditions to be performed within a specified time ; and the time having elapsed, and the conditions not being performed, the agreement to convey is cancelled. The contract does not employ either of the words "grant," "bargain," "sell," or "convey," or any word of equivalent import. Considering the entire instrument, we hold it not a conveyance, but an agreement to convey, on conditions therein expressed. Chapman v. Glassell, 13 Ala. 50. The conditions most important to be noted are the following: To commence the survey of the said road within four months of the date of the contract, Oct. 8, 1881, and within three years to complete it, running "into or through the counties of Tuscaloosa, Walker, Winston, Marion, Franklin, Colbert, and Lauderdale, State of Alabama." The clause which binds Henry

Conditional
agreement for
conveyance.
Time of essence
of agreement.

and his wife, the latter now Mrs. Thornton, is in the following terms: "Now, in that event, . . . we, Gus A. Henry and Ella W. Henry, his wife, do hereby agree and bind ourselves, our heirs, administrators, executors, and assigns, to make unto the said Eugene C. Gordon and his associates, and upon the compliance of the said Gordon and his associates with the terms of this contract, hereby [agree to] vest the said Gordon and his associates with good and sufficient titles. . . . We give the right for the said railroad to enter our plantation, and go through the same, in constructing said road, free of charge, provided it does not interfere with the buildings." There are other provisions in the contract clearly indicating that it was not intended as a conveyance, but only as an agreement to convey. Among them is the following: "It is further expressly and specially understood that no such deed to the lands as above described . . . is to be made, as described in this instrument, if the said Gordon and associates should fail to build such portion of the road, and do the work as required by the terms of this instrument." Under the force of the clauses copied, and other provisions of the contract, we feel authorized to insert the words "agree to" which we have placed between brackets above. We hold that, under the terms of this contract, the complainant bound herself to give and convey the right of way only in the event Gordon and associates, or their assigns, performed the stipulations they entered into, and which constituted the consideration of complainant's agreement to convey. *Railroad Co. v. Railway Co.*, 73 Ala. 426, 440. We hold, further, that the agreement in this case makes time an essential element of the contract; and Gordon and associates, having broken the agreement on their part, have forfeited all right to claim its observance on the part of complainant. It is contended for appellee that, by permitting the railroad company to construct its road and operate it

without interference, complainant has estopped herself from now asserting her right to compensation for the right of way. There is no principle of estoppel against this claim, considered as a mere demand for damages for the right of way. If she were seeking to evict the corporation, there might be something in the objection. That is not the purpose of this suit. She claims only for the injury done to her freehold; and that claim, under the averments of the bill, stands on the same meritorious ground as if the road had been built without prior attempt to procure or condemn the right of way. Such acquiescence, to operate a bar, must be of sufficient duration to toll entry. *Association v. Jones*, 68 Ala. 48; *Jones v. Railroad Co.*, 70 Ala. 227; *Railroad Co. v. Railway Co.*, 73 Ala. 426; 1 Wood, *R'y Law*, § 209; *Perkins v. Railroad Co.*, 72

Land-owner
not estopped to
claim damages.

Me. 95 ; s. c., 6 Am. 1 Eng. R. R. Cas. 608. The course adopted by the complainant in this case is fully justified by the authorities, and the bill should be retained and made effective, by injunction if necessary, until the damages are properly ascertained, or until the railroad company obtains the right of way in legal form. *Taylor v. Railroad Co.*, 25 Iowa, 371; *Browning v. Railroad Co.*, 4 N. J. Eq. 47; *Gilman v. Railroad Co.* 40 Wis. 653; *Rusch v. Railway Co.*, 54 Wis. 136; 2 Wood, R'y Law, § 246.

The present suit was instituted in July, 1887. At that time, and since Feb. 28, 1887, "the wife must sue alone, at law, or in equity, . . . for the recovery of her separate property, or for injuries to such property." Act approved Feb. 28, 1887 (Sess. Acts, p. 80, § 7; Code 1886 § 2347). The chancellor erred in sustaining the eighth ground of demurrer, and there is nothing in the other grounds assigned. Rule of chancery, practice No. 13, Code 1876, same number in Code 1886, has no application to bills which contain no interrogating part; and, like the forms of the complaints given in the code, is, at most, directory.

The decree of the chancellor is reversed, and a decree here rendered overruling the demurrer. The decree appealed from being interlocutory, the cause is still pending in the court below, and there is no need of an order of remandment.

Estoppel of Land-Owner to claim Damages. — There is no estoppel *in pais*, where the land-owner makes no grant, executes no licenses, and makes no representations. In such a case the land-owner is not estopped to assert his right to damages, although it is possible that long acquiescence might preclude him from recovering the land itself. *Bloomfield R. Co. v. Grace (Ind.)*, 11 West. Rep. 368.

Conditional Conveyance of Right of Way. — See *Houston, etc., R. Co. v. McKinney*, and note, 8 Am. & Eng. R. R. Cas. 723-734; *Griswold v. St. Louis, etc., R. Co.*, 1 Ib. 626; *Hastings, etc., R. Co. v. Miles*, 6 Ib. 606; *Jeffersonville, etc., R. Co. v. Barbour*, and note, 14 Ib. 466-471; *Cleveland, etc., R. Co. v. Coburn*, and note, 17 Ib. 37-44; *Tutt v. Port Royal, etc., R. Co.*, and note, 20 Ib. 367-371; *Hull v. Chicago, etc., R. Co.*, and note, 20 Ib. 341-344; *Ingalls v. Byers*, 20 Ib. 344; *Rush v. Burlington, etc., R. Co.*, 11 Ib. 298; *Hannow v. Port Royal, etc., R. Co.*, 11 Ib. 352; *Galveston, etc., R. Co. v. Pfeuffer*, 11 Ib. 373; *Crosby v. Chicago, etc., R. Co.*, 14 Ib. 463; *Crow v. Owensboro*, 17 Ib. 31; *Close v. Burlington, etc., R. Co.*, 17 Ib. 33; *Waldron v. Toledo, etc., R. Co.*, 20 Ib. 348; *Jones v. St. Louis, etc., R. Co.*, 20 Ib. 371; *Missouri Pacific R. Co. v. Tigard*, 22 Ib. 54.

Note Payable "when Cars shall run" to Stated Place. — Construction Trains. — Defendant made a note payable to plaintiff ten days after its cars should run to a stated place, if that should be in eighteen months; otherwise to be null and void. The track was laid from one terminus to the point within the time, and daily construction trains ran; but it was not open to freights or passengers for some months after the time. In an action on the note, plaintiff asked for the following instructions, in effect: (1) If plaintiff's cars ran to the place in the time, it could recover. (2) That it was not necessary that the road be completed through in the time. (3) That cars run its entire length. (4) If the track was laid from one terminus to the place in the time so that

construction trains could run, plaintiff could recover. These the court refused, and instructed in substance, that a fair construction of the contract was, that the road was to be open to freights and passengers in the time; and, it being admitted it was not, they would find for defendant. *Held*, that the instruction given was erroneous; and the instructions asked for should have been given, and the case given to the jury. *Pontiac, O., & Pa. R. Co. v. King*, 35 N. W. Rep. 705.

CRISWELL

v.

PITTSBURG, CHICAGO, & ST. LOUIS R. CO.

(*West Virginia Supreme Court of Appeals, Feb. 18, 1888.*)

Fellow-Servant. — Foreman of Laborers is Vice-Principal. — When a railroad company puts a foreman in charge of a gang of laborers, with power to discharge them, subject to the approval of the supervisor, and makes it his duty to see that these laborers faithfully perform their duty, such foreman must, in the performance of all his duties to those laborers under him, be regarded as the representative of the railroad company; and if, through his neglect of duty, one of these laborers, in the performance of his duty, is injured, he may recover of the railroad company the damages he has sustained, caused by the negligence of such foreman.

Negligence of Foreman. — Duty to prevent Collision. — If one of the rules of the railroad company, furnished him for his guidance, provides that "extra trains may pass over the road at any time, without previous notice, and the foreman must be always prepared for them;" and another rule provides "he must run the hand-cars with great caution, and he must not permit them to be used unless he accompany them;" and another rule requires him "to compare his time-piece with the clock at the nearest telegraph office, or with the conductor on the train," — these rules, as well as the law, require him to use the opportunities thus daily afforded, or any other opportunities, to ascertain what trains are expected to run over his section of the track by previous arrangement, and when so, that he may be prepared for them as well as he can be, and thus diminish the risk of a collision of extra trains with the hand-car.

Same. — Company Responsible for his Negligence. — If he neglects this duty, and, without the fault of one of the laborers under him, his hand-car comes into collision with an extra train, which, had he performed his duty, would not have occurred, and the laborer on the hand-car is killed or injured, the railroad company will be liable for the damages so sustained.

Assumption of Risk by Servant. — Nor will the fact that the laborer voluntarily got upon the hand-car in very foggy weather, and no flag was sent out in advance, and no precautions taken to prevent a collision, prevent such a recovery from the railroad. Though the laborer knew these facts and rules of the company, if he had not been informed of such negligence of the foreman, such conduct of the laborer, without such knowledge, would be a voluntary assuming on himself only the risk of a collision with an extra train which the foreman could not have ascertained would be on the track, and come in collision with his hand-car, if he had used, as he should have done, the opportunity he had of obtaining information about them.

ERROR to Circuit Court, Ohio County.

This was an action on the case, brought by N. C. Criswell, administrator of Thomas Waldron, in the Circuit Court of Ohio County, against the Pittsburgh, St. Louis, & Cincinnati Railway Company, a corporation under the laws of this State, for damages resulting from the killing of Thomas Waldron on Oct. 4, 1884, by the collision of a passenger train of this railroad company with a hand-car on the track of this railroad, on which he was travelling, as a hand in the employment of this company, to a place where work was to be done to keep in repair the track of the road. The suit was brought on Dec. 4, 1884. The declaration was filed at the February rules, 1885, and contained four counts. At the February rules, 1885, an amended declaration was filed; there being added in it two counts substantially the same as the four counts in the original declaration; a fifth count, which, as it is fuller and shows the character of the suit in detail more fully than the other counts in this declaration, I will state at length. It is as follows: —

“Fifth Count. And the said plaintiff further complains and says, that whereas, the said defendant, at the time of the committing by it of the grievances as hereinafter mentioned, was in possession of a certain other railroad in the county of Ohio, and of a certain other railroad locomotive steam-engine, and of other railroad cars to the last-mentioned engine attached, and also of a certain other hand-car, which said engine, cars, and hand-car were then used, managed, and controlled by the said defendant, upon the said railroad last mentioned, at the time last aforesaid, and the said defendant was then and there using, managing, controlling, and driving the said engine and cars last mentioned upon and along the said last-mentioned railroad, and was driving and running the same upon the said railroad last mentioned towards the city of Wheeling, in the said county of Ohio; and the said Thomas Waldron, deceased, of whose estate the said plaintiff is administrator, as aforesaid, was then and there, being then in full life, a servant of the said defendant, by it employed to do certain work and labor upon the said railroad last mentioned, and was by the said defendant licensed, permitted, instructed, and required to go and travel upon the last-mentioned hand-car, along the railroad last mentioned, at all times, from the said city towards the place upon said railroad last mentioned where the said engine and cars thereto attached, last mentioned, were then being run and driven on the said railroad last mentioned towards the said city; and it was then and there the duty and obligation of the said defendant to give notice to the said Thomas Waldron, deceased, of all engines, cars, and trains moving and being driven upon the last-mentioned railroad towards the said city of Wheel-

ing, and of all obstructions upon the said last-mentioned railroad. Yet the said defendant, though well knowing the premises, and that the said engine and cars last mentioned were being moved and driven with great rapidity, along and upon the last-mentioned railroad towards the said city, and without giving to the said Thomas Waldron, deceased, any notice thereof, carelessly, negligently, and improperly allowed, permitted, directed, and required him to go and travel upon the last-mentioned hand-car, along and upon the railroad last mentioned, towards the place where the engine and cars last mentioned were being moved and driven, as aforesaid, along and upon the last-mentioned railroad, towards the said city of Wheeling; and the said Thomas Waldron, deceased, then in full life, did, as such servant, and in accordance with his duty as such servant, and being wholly ignorant, and without any information from any source, that the engine and cars last mentioned were being rapidly moved and driven along and upon the said railroad, towards the said city, go, proceed, and travel upon the said hand-car last mentioned, along and upon the said railroad last mentioned, towards the engine and cars last aforesaid; and the said defendant did then and there carelessly, negligently, and improperly wholly fail to notify the said Thomas Waldron, deceased, of the approach towards said city of the engine and cars last mentioned, as the said defendant ought to have done; and the said Thomas Waldron, deceased, then in full life and vigor, going, proceeding, and travelling thereon with all reasonable care and circumspection, upon and along the last-mentioned railroad, the hand-car last aforesaid was run against, into, and upon, with great force and violence, by the engine and cars last mentioned, then moving with great rapidity towards and against the hand-car last mentioned; to wit, on the fourth day of October, 1884, at the said county of Ohio; by means whereof the said Thomas Waldron, deceased, then in full life, was then and there, with great force and violence, struck, wounded, hurt, and injured, and thrown from the said last-mentioned hand-car to the ground; by reason of which violence, striking, wounding, hurting, and injuring last mentioned the said Thomas Waldron, deceased, did thereafter, to wit, on the day and year aforesaid, die. And the said plaintiff says that the carelessness, negligence, default, and wrongful conduct of the defendant last aforesaid was the cause of the death of the said Thomas Waldron, deceased; that the said carelessness, negligence, wrongful conduct, and default of the said defendant in this count mentioned, and the wounds, hurts, and injuries thereby caused, as hereinbefore in this count mentioned, were such as would have entitled the said Thomas Waldron, deceased, if his death had not ensued, to maintain an action against the said

defendant in respect of the last-mentioned carelessness, negligence, default, and wrongful conduct of the said defendant as in this count mentioned; that the said Thomas Waldron, deceased, has left surviving him his widow, Bridget Waldron, and his infant children, John Waldron and Thomas Waldron, who are the distributees of his estate; that this suit is brought for the benefit of the distributees of the estate of the said Thomas Waldron, deceased; and that, by reason of the premises contained, the distributees of the estate of the said Thomas Waldron, deceased, have been greatly injured, and have sustained damages to the amount of \$10,000; and the plaintiff says that, by reason of the premises, he has been greatly injured, and has sustained a large amount of damages; to wit, to the amount of \$10,000, and therefore he sues," etc.

"DENNIS O'KEEFE and
"W. P. HUBBARD, P. Q."

The declaration, and each count thereof, was demurred to. The plaintiff joined issue on this demurrer, the court sustained the demurrer to the first count, and overruled it as to all the other counts. The first count was very general and brief; and, instead of alleging circumstances, as the other counts all did, showing that, when the accident happened, the plaintiff's intestate had a right to be on the track of the defendant as its employee, it simply alleged that the defendant's servant negligently drove its engine against the plaintiff's intestate, and killed him; not alleging that he was lawfully on the track of the defendant. The other counts had in them substantially all that was essential to make the fifth count good; and were all, except this first count, good, if the fifth count above stated is good. The defendant pleaded not guilty, and issue was joined on this plea. This issue was tried by a jury on Dec. 24, 1885, who found for the plaintiff, and assessed his damages at \$5,000. The defendant moved the court to grant it a new trial, and on the 29th of May, 1886, the court overruled this motion, and thereupon rendered a judgment for the plaintiff against the defendant for the sum of \$5,000, the damages assessed by the jury, with interest from Dec. 24, 1884, and costs; to which action of the court the defendant excepted.

The bill of exceptions sets out all the evidence offered to the jury on either side, all the rulings of the court during the trial, and all the instructions to the jury given and refused by the court. This evidence proves these facts: The plaintiff's intestate was in the employ of the defendant as a track-repairer from Dec. 23, 1881, till he was killed on Oct. 4, 1884. He was with a gang of four other men, in charge of one Foutz as their foreman,

who worked with these men on a section of the defendant's road, six miles in length, extending from the freight depot of the defendant north, on the east side of the Ohio River, to six miles. The immediate superior of the foreman in that division of the defendant's road was one Kearns, the supervisor of that division of the road, who had to see that Foutz, and also other foremen in his division of the road, kept it in repair, and did their duty as foremen of these small gangs of laborers. He travelled in the trains over that division of the road daily to see that the road was kept in repair; and he furnished to the foremen of these small gangs of laborers, who did the actual work of keeping in repair, hand-cars, which were under the exclusive control of these foremen of small gangs of laborers; the foreman working with these laborers on short sections of the road, keeping it in repair. These laborers were under the charge of these foremen, who could suspend them from work or dismiss them at any time, subject to the approval of the supervisors of the road in which the short sections of the road were located. So if Foutz, the foreman of the six-mile section beginning at the freight depot and extending northward six miles, removed or suspended any of the gang of laborers, — track-repairers, — in his charge, he had immediately to report the case to the supervisor of this division, Kearns. Foutz directed the men in his charge when and where to work, and worked with them. If the distance they had to go to work was as far as the point where this accident took place, on Oct. 4, 1884, was from the toolhouse in Wheeling, they always rode on the hand-car, which was in charge of the foreman Foutz, and kept at the toolhouse. He did not order the men in his charge to get on the car to go to their work; but, when he had put on the car, they would get upon it of their own accord, as the plaintiff's intestate did the morning this accident occurred, Oct. 4, 1884. They could not use this hand-car except with his assent. If they had three or four miles to go in the morning, and did not ride on this hand-car, they would not reach the place they were to work in proper time. It was much faster than they could walk. The plaintiff's intestate lived in the same building with his foreman Foutz, at the time of the accident. It occurred thus: On the evening of Oct. 3, 1884, a body of men called "Plumed Knights," wishing to make an excursion to Columbus, O., made, in Wheeling, an arrangement with the authorized agents of the defendant, whereby they were taken to Columbus on the defendant's train the next day; and wishing to return very early Saturday morning, Oct. 4, 1884, to Wheeling, the defendant, by its agent, agreed that there should be run an extra or special train from Steubenville to Wheeling early on the morning of Saturday, Oct. 4, 1884; so that they could get back

to Wheeling earlier than they could by the regular passenger train of the defendant coming from Steubenville on the morning of Oct. 4, 1884. Neither Foutz, the foreman of this gang of track-repairers, nor any of the men in his charge, nor the plaintiff's intestate, knew any thing of this arrangement for this special or extra train to be run from Steubenville to Wheeling on the morning of Oct. 4, 1884, before the regular passenger train came down the morning of Oct. 4, 1884. The work of this gang of men in charge of Foreman Foutz in repairing the road was some four miles from the toolhouse in Wheeling. Most of the men in his charge preferred staying in Wheeling on Oct. 4, 1884, to attend some political parade to take place that day; but the plaintiff's intestate, Foutz, and his son, about 15 years old, who lived in the same building, near this toolhouse, which is about three-quarters of a mile north from the defendant's freight depot in Wheeling, where the section of six miles which Foutz, as foreman, with his gang, kept in repair, went from their home a short distance to the toolhouse, and there put the hand-car on the track, and got upon it, on Saturday morning, about six o'clock, a few minutes after the regular passenger train from Wheeling northward, and over the defendant's road, went up. They had gone about three and a quarter miles from this toolhouse on this hand-car, when the car came in collision with this extra or express train coming to Wheeling from Steubenville.

Neither the officers in management of this extra train, nor any of the parties on this hand-car, saw such collision was about to occur, or apprehended it until probably a second or two before the engine of this extra train struck this hand-car. This was owing to a dense fog that morning, which prevented a person from seeing more than ten or fifteen yards. The foreman Foutz, however, saw the train just in time to jump from the hand-car, and save his life; but his son and the plaintiff's intestate did not see the coming train, and remained on the hand-car, which was smashed to pieces, and both of them killed; Foutz's son instantly, and the plaintiff's intestate had his thigh broken, and died in three or four hours afterwards. The extra train was running at the usual rate of a passenger train, some thirty-five miles an hour. The agents of the defendant in charge of this train only knew of what occurred by the jarring of the cars, produced by this collision. They had whistled at a crossing by a road across this railroad a half mile north of the place where this accident occurred. There is a diversity in the evidence about how loud this whistling was; some of the witnesses representing it as a very slight whistling, others as louder than usual. The jury, from this finding, I presume, regarded it as so slight as that those on the hand-car could not hear it, because of the noise

made by the running of the hand-car; or, if they did hear it, they supposed it was the whistling of an engine on a railroad on the Ohio side of the river, there being a railroad there, just across the Ohio river from the defendant's railroad, which whistling was frequently done on about that time of day. The jury doubtless held that those on the hand-car were not guilty of negligence in either not hearing this slight whistling, or not supposing it was the whistling of an approaching train on the defendant's railroad. The cars were stopped as soon as they could be after this collision, and the plaintiff's intestate was taken to the hospital in Wheeling on them, where he died in three hours from the injuries he had received. He was about forty-five years of age, healthy and industrious. He left a wife and two sons; one a child some two years old, and one about fifteen years old.

The rules of the defendant in reference to the duties of foremen of gangs of laborers to repair the road proven in evidence were rule 394 which reads, "The track foreman must engage in all work personally, and see that the laborers employed under him faithfully perform their duties." Rule 397 says, "He may discharge or suspend from duty any employee under his charge, but must report the case promptly to the supervisor for his approval. He must not increase his force without his consent." Rule 392, "He must compare time each day with the clock at the nearest telegraph office, or with the conductor of a train." Rule 401 reads as follows: "He must never obstruct the track in any way whatever, without first conspicuously displaying and using all danger signals at least nine hundred yards in both directions on single track, and nine hundred yards in the direction trains are expected on double track. Extra trains may pass over the road at any time without previous notice, and the foreman must always be prepared for them. Any thing that interferes with the safe passage of trains at full speed is an obstruction." A copy of these rules were furnished every foreman of repair hands, and Foreman Foutz had a copy of these furnished to him by the defendant. The danger signal spoken of in these instructions is a red flag. No red flag was used as a signal to prevent accidents on the morning of the 4th of October, 1884, no one being sent forward with such flag in advance of the hand-car, nor was any other precaution taken to prevent a collision with an extra train, no one on the hand-car having any notice of an extra to be run that morning. Extra trains run over this part of the defendant's railroad at irregular times, sometimes two or three times a day. By extra trains it is meant any train or engine which is run on a special occasion. These trains, over this part of the road, would average about three a

week ; though they run at very irregular intervals, and only whenever the interest or requirements of the road demanded it. They are sometimes started at only a half hour's notice to the agents of the defendant that they are to be started. Sometimes the agents starting an extra train, as in this case, may have several days' notice when it is to be started. It was proven that it was impracticable to give notice of the running of these extra trains to the foreman of the gangs of railroad repairers, and that it is not the practice to give such notice to such foremen on railroads generally. It was proven, however, that in the years 1881-82 notices were frequently given by throwing out a note to the foreman as the train passed along, when he was at work with his gang of track-repairers, telling him when an extra train might be expected ; but it is at least questionable whether this was as often done by supervisor of the foreman of the track-repairers as by others whose duty it could not have been, as officers of the defendant, to do so, but who did it of their own accord as acts of kindness, when it could be done conveniently. Neither these rules of the defendant above stated, nor any others, were ever made known to the plaintiff's intestate, and no proof of his having any notice or knowledge of them appears, unless such knowledge could be inferred from the knowledge he necessarily had of the substance of these rules, or of some of them, from his daily observations of what was done by this foreman who had a copy of them, and except that Foreman Foutz testified that he told Waldron and the other hands at times that they would have to be on the lookout for specials at any time. They might come at any time. But he cannot remember any particular occasion when he told the plaintiff's intestate this.

" Upon this proof of facts and this evidence being adduced to the jury, and this being all the material facts or evidence in the case, thereupon, on motion of the plaintiff, the court gave to the jury the following written instructions : '*Instruction No. 1.* The jury are instructed that it is immaterial what rules the defendant had adopted, unless they were brought to the knowledge of the plaintiff's decedent, Thomas Waldron. *Instruction No. 2.* The jury are instructed that with respect to the question of contributory negligence on the part of Thomas Waldron the burden of proof is on the defendant.' To the giving of each of said instructions, the defendant objected, but the court overruled said objections, and each of them, to which rulings of the court the defendant then and there excepted ; and the plaintiff moved the court to give to the jury the following instruction : '*Instruction No. 3.* The jury are instructed that the defendant was bound to take all reasonable precautions for the safety of the laborers employed by it on its track, including the plaintiff's decedent, Thomas

Waldron.' And the defendant having moved the court to give to the jury the following instructions: "*Instruction No. 6.* The defendant had the right to make such rules and regulations for the conduct of its servants and agents, while engaged in its service, as in its judgment were reasonable or proper, or would conduce to the safety and comfort of its employees; and all servants while engaged in such service, with a knowledge of such rules and regulations, were bound to act in conformity therewith; and, if the injuries were sustained by them while acting in violation thereof, no recovery can be had of the defendant therefor, if such violation was the cause of, or materially or directly contributed to, such injury;' the court gave both said instructions together, adding the word 'yet' to the defendant's instruction No. 6 at the end of plaintiff's instruction No. 3, so that they read as follows: 'The jury are instructed that the defendant was bound to take all reasonable precautions for the safety of the laborers employed by it on its track, including the plaintiff's decedent, Thomas Waldron; yet the defendant had the right to make such rules and regulations for the conduct of its servants and agents, while engaged in its service, as in its judgment were reasonable and proper, or would conduce to the safety and comfort of its employees; and all servants, while engaged in such service, with a knowledge of such rules and regulations, were bound to act in conformity therewith; and, if the injuries were sustained by them while acting in violation thereof, no recovery can be had of the defendant therefor, if such violation was the cause of, or materially and directly contributed to, such injury.' And the defendant objected to the giving of said plaintiff's third instruction, either alone or with said defendant's said instruction; but the court overruled said objections, and each of them, and required said instructions to be read together to the jury; to which rulings and action of the court the defendant then and there excepted.

"And thereupon the defendant moved the court to give to the jury the following instructions: '*Instruction No. 1.* The jury are instructed that the plaintiff can only recover by reason of negligence on the part of the defendant, and this negligence can only be established by a preponderance of the evidence. *Instruction No. 2.* If the jury believe from the evidence that the plaintiff's decedent was aware of the contents of the rules of the defendant company in relation to track foreman, or that special or extra trains might pass over the road at any time without any previous notice to the foreman or laborers upon the track; and if they further find that, with such knowledge, the said Thomas Waldron remained in the employ of the defendant, then, in that case, he assumed the risks of his employment without such

notice. *Instruction No. 3.* The jury is instructed that the plaintiff can only recover after a finding that the defendant was guilty of such negligence that it caused the death of said Thomas Waldron, and that the decedent was not guilty of any such neglect or fault as directly contributed to produce the death. *Instruction No. 5.* If the jury believe from the evidence that there was unusual danger in running a hand-car upon the tracks of the defendant on the morning of the fourth day of October, 1884, and that Thomas Waldron knew or was bound to know of such unusual danger, then in that case it was his duty to use unusual precautions to protect himself.' To the giving of which, and each of them, the plaintiff objected; but the court overruled said objections, and permitted them to be read to the jury; to which rulings and action of the court the said plaintiff then and there excepted.

"And the defendant further moved the court to instruct the jury as follows: '*Instruction No. 4.* The jury is instructed that the defendant company had a right to prescribe rules relating to section foremen, and the jury cannot consider or determine whether such rules are reasonable or not.' But the court refused to give said instruction without modifying the same by adding thereto the following: 'Provided, the jury further believe from the evidence that Thomas Waldron had knowledge of such rules, and continued in the service of the defendant with such knowledge;' and the same was added to said instruction, and was then given to the jury. To which rulings of the court, in refusing to give said last-named instruction without modifying the same, and in adding said modification, and each of said rulings, the defendant then and there excepted.

"And, upon the further motion of the defendant, the court instructed the jury as follows: '*Instruction No. 7.* If the defendant, in the exercise of its discretion, adopted a rule for the conduct of all its employees while engaged in its service, and intended for their personal protection against injury, and an employee, knowing the rule, neglected to avail himself of its provisions, and in consequence of such neglect sustained an injury, he cannot hold the defendant liable therefor.' And the defendant further moved the court to give to the jury the three following instructions: '*Defendant's Instruction No. 8.* The company is not liable for an injury which happens to an employee in consequence of disregard of its plain instructions. *Defendant's Instruction No. 9.* The jury is instructed that the defendant company had a right to prescribe rules relating to section foremen and laborers upon the tracks, and the jury cannot consider or determine whether such rules are reasonable or not. *Defendant's Instruction No. 10.* Under the rules of the defendant, Nos. 401 and 402, it was not,

at the date of the death of the plaintiff's decedent, the duty of the defendant to give notice to the laborers upon its tracks of the sending out of special or extra trains.' To the giving of which instructions, and each of them, the plaintiff objected; and the court sustained each of said objections, and refused to give either of said three last-named instructions. To which rulings and action of the court, in refusing to give said instructions, and each of them, the defendant then and there excepted.

"And, as elsewhere appears in the record of this case, the same was agreed and submitted to the jury, who rendered a verdict for the plaintiff. The defendant made a motion that the court set aside the verdict of the jury rendered herein, and grant it a new trial, which motion was submitted to the court, and by it overruled; to which ruling and judgment, of the court the defendant excepted, and all of which appears of record as aforesaid.

"And the court entered judgment on the verdict, to which defendant excepted, and tendered this, its bill of exceptions, to the aforesaid rulings and judgment of the court; and prayed that the same might be signed, sealed by the court, and made part of the record in this court, which is here accordingly done.

JOHN I. JACOB." [Seal.]

From the judgment of the Circuit Court, rendered on May 29, 1886, the defendant has obtained a writ of error and *superseas*.

J. Dunbar for plaintiff in error.

W. P. Hubbard and *Denis O'Keefe* for defendant in error.

GREEN, J. — This action on the case was brought by the administrator of Thomas Waldron, a track-repairer, against the Pittsburgh, Cincinnati, & St. Louis Railway, to recover damages for the death of his intestate, caused by the neglect of the defendant by negligently running a train of cars against a hand-car, on which said Waldron was travelling to a point at which he was to do work in repairing the defendant's railroad. The suit was brought under our statute, to be found chap. 104, sects. 5, 6, p. 708, Code W. Va. 1887. The court sustained a demurrer to the first count in the declaration, but overruled the demurrer to each of the four last counts of the declaration. No defects in these last four counts of the declaration were pointed out by the appellant's counsel, and we see none. These counts did not state any one of the particular acts constituting the plaintiff's negligence, but only, in general terms, that it negligently ran its train of cars on the hand-car on which the plaintiff's intestate, its employee, was travelling law-

The case stated.
Pleading.

fully, thereby causing his death; and none of them specifically stated that the plaintiff's intestate was not guilty of contributory negligence. In some States, these omissions would have been held to be defects in these counts; but in this State it has been expressly decided that such omissions are not defects. See *Hawker v. Railroad Co.*, 15 W. Va. 645; *Snyder v. Railway Co.*, 11 W. Va. 14.

The defendant was granted, by the court below, three instructions to the jury as follows: "*Instruction No. 1.* The jury are instructed that it is immaterial what rules the defendant had adopted, unless they were brought to the knowledge of the plaintiff's decedent, Thomas Waldron. *Instruction No. 2.* The jury are instructed that, with respect to the question of contributory negligence on the part of Thomas Waldron, the burden of proof is on the defendant. *Instruction No. 3.* The jury are instructed that the defendant was bound to take all reasonable precautions for the safety of the laborers employed by it on its track, including the plaintiff's decedent, Thomas Waldron," to each of which the defendant excepted. The appellant's counsel admit that instructions Nos. 1 and 3 propounded the law correctly, but insist that there was no evidence justifying the giving of them. I will show hereafter that there was evidence submitted to the jury which rendered it proper to give these instructions. Instruction No. 2, it is claimed, does not propound the law correctly, and that the burden of proving there was no contributory negligence was on the plaintiff. But this court has decided that this instruction propounded the law correctly. See *Snyder v. Railway Co.*, 11 W. Va. 14.

Instructions
granted and
refused.

The defendant below asked six instructions to the jury; and one, No. 4, was granted, with a qualification, which was as follows: "*Deft's Instruction No. 4.* The jury are instructed that the defendant's company had a right to prescribe rules relating to section foremen, and the jury cannot consider or determine whether such rules were reasonable or not." The qualification added by the court in giving this instruction was, "Provided, the jury further believe from the evidence that Thomas Waldron had knowledge of such rules, and continued in the service of the defendant with such knowledge." The adding of this qualification, before the instruction was given, was excepted to by the defendant. If plaintiff's instruction No. 1 lays down the law correctly, — and the appellant's counsel admits that it does, — then this qualification of this instruction was necessary to make it consistent with plaintiff's instruction No. 1; for without the qualification that Thomas Waldron had knowledge of such rules, it would be immaterial in this case what these rules were. And

to instruct the jury that the company had a right to make any rules and regulations, unless qualified as it was by the court, would obviously have tended to mislead the jury.

The court refused to grant these three instructions to the jury: "*Instruction No. 8.* The company is not liable for an injury which happens to an employee in consequence of a disregard of its plain instructions. *Instruction No. 9.* The jury is instructed that the defendant company had a right to prescribe rules relating to section foremen and laborers upon the tracks, and the jury cannot consider or determine whether such rules are reasonable or not. *Instruction No. 10.* Under the rules of the defendant Nos. 401 and 402, it was not, at the date of the death of plaintiff's decedent, the duty of the defendant to give notice to the laborers upon its tracks of the sending out of special or extra trains," to which the defendant excepted. Instruction No. 8 ought not to have been granted, unless qualified as instruction No. 4 was; and, when so qualified, it would have been substantially the same as instruction No. 4 granted the defendant, and set out in the statement of this case. The instruction No. 9 was, when so qualified, precisely the same as instruction No. 4, which had been granted the defendant; and without this qualification, as I have shown, it ought not to have been granted. Instruction No. 10 was a simple construction of rules Nos. 401 and 402 of the defendant, as set out in the statement of the case, and they were perfectly plain in their meaning; but, as the plaintiff's instruction No. 1 had said, it was entirely immaterial what they were, or what they meant, if they were unknown to the plaintiff's intestate, Waldron, to have given this tenth instruction without this qualification would have misled the jury; and, if so qualified, it would have been of no possible aid to the jury, as the meaning of these rules was perfectly clear. Taking all of the instructions together, as stated in the statement of the case, those given, and those refused, and those qualified, they presented the law, so far as asked for by either party, correctly to the jury.

It only remains to determine whether the court erred in refusing to grant the defendant a new trial. This will depend upon the law in reference to certain points in the case as to which neither party asked any instruction of the court, and which I will now consider. A master is not liable to his servant for negligence of his fellow-servant while engaged in the same common employment, unless he has been negligent in the selection

Who are fellow-servants, foreman, and laborers.

of the servant in fault, or in retaining him after notice of his incompetency. See Shear. & R. Neg. sect. 86. And a "fellow-servant," within the meaning of this rule, is generally held to be any one serving the same master and under his control, whether

equal, inferior, or superior. *Id.* sect. 100. One to whom an employer commits the entire charge of his business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, has nevertheless been generally considered not a fellow-servant with those who are employed by him. But even this has not been universally held; as, for instance, the contrary is held in Massachusetts. *Id.* sect. 103. But in sect. 104 they give sound reasons, we think, to bring the case within the same rule, when the master delegates to a superintendent a power to appoint but not remove, or to remove but not appoint; and they refer to an Ohio decision and Kentucky decision to sustain this position. And it is the view taken by other text-writers. But the contrary views are held in many States; but I think the better considered of recent American cases is, that if a master delegates to a superintendent the performance of certain duties, to the extent of the discharge of those duties, he stands in the place of the master; but, as to all other matters, he is a mere co-servant. I have stated the law as held generally, and also the modifications of it by recent, and I think well-considered, American cases; but I have deemed it unnecessary to refer to the authorities, or consider their reasoning, because the subject has recently been before this court, and the whole subject maturely considered; and, for the reasons assigned, we have reached definite conclusions as to who are to be considered as co-servants within the meaning of the rule, whom a railroad company employs to perform some duty, who has under his charge and controls other servants of the railroad company. This was done in the case of *Riley v. Railway Co.*, 27 W. Va. 145. The conclusions we then reached, and for the reasons assigned by Judge Snyder in delivering the opinion of the court, we approve, and are not disposed to reconsider. The syllabus of this case states these conclusions thus: "When a railroad company puts a superintendent, foreman, or other employee in its place, to discharge some duty which it owes to its servants or employees, as to such duty such superintendent or other employee is not a co-servant, but the representative of the company; and as to such duty the company is bound by the acts or omissions of such middle-man, the same as though the acts had been done or omitted by the company itself. Whenever such company delegates to another the performance of a duty to its servants which it has impliedly contracted to perform itself, or which vests upon it as an absolute duty, it is liable for the manner in which the duty is performed by the middle-man whom it has selected as its agent; and to the extent of the discharge of these duties by the middle-man, he stands in the place of the company, but as to all other matters

he is a mere co-servant. The question in such case is not whether the company reserved to itself any oversight or discretion, but whether it did in fact clothe the middle-man with power to perform its duties to the servant injured."

This being the settled law of this State, whatever may be the law in some other States, should Foutz, the foreman of the gang of track-repairers, be regarded when this accident occurred, on Oct. 4, 1884, as standing in the place of the defendant below as to its duties to these track-repairers, including the plaintiff's intestate, Waldron; or were Foutz, the foreman, and Waldron co-laborers, co-servants, then, of the defendant below, the railroad company? That, in the words of the syllabus which I have quoted as laying down the law in this State, depends not upon whether the company reserved to itself any oversight or discretion, but whether it did in fact clothe Foutz, the foreman, with the power to perform its duties to Waldron, its servant under the charge of this foreman. This must be ascertained by seeing what powers were conferred by the company on Foreman Foutz. They are set out in the rules of the company, and from them we can ascertain what both his powers were, and what duties he owed the company. As Foutz and all other foremen were provided with a copy of these rules, he and they must of course be held as accepting the position, with the powers as well as duties conferred and imposed by these rules; and of course his employer could confer on him whatever power it chose, and impose on him whatever duties it chose, by its rules. And it is immaterial whether they were just and reasonable in the estimation of others or not. It was simply a bargain between the company and him, whereby they conferred on him certain powers; and, in consideration of certain pay, he agreed to perform certain duties. Such contract between the company and Foutz would be enforced as any other contract, if there were no special circumstances in the case which would prevent the court from enforcing it, or induce it to nullify such contract upon general principles applicable to other contracts. The rules of the company regulating the powers and duties of Foutz and all other foremen of track-repairers were these: Rule 394, "Such foremen must engage in all work personally, and see that the laborers employed under them faithfully perform their duties." Rule 396, "They may discharge or suspend from duty any employee under their charge, but must report the case promptly to the supervisor for his approval. They must not increase their force without his consent." Rule 397, "They must compare time each day with the clock at the nearest telegraph office, or with the conductor of a train." Rule 401 reads as follows: "They must never obstruct the tract in any way whatever,

without first conspicuously displaying and using all danger signals at least 900 yards in both directions on single track, and 900 yards in the direction trains are expected on double track. Extra trains may pass over the road at any time without previous notice, and the foreman must always be prepared for them. Any thing that interferes with the safe passage of trains at full speed is an obstruction." Rule 402 reads as follows: "They must run their hand-cars with great caution, always keeping a sharp lookout for extra trains, and protect themselves by signals at all dangerous points. They must not run within twenty minutes of the time of any passenger trains, nor in the wrong direction on double track. They must not permit their hand-cars to be used, unless they accompany them; nor run them on Sundays, or after working hours, without special permission from the superintendent. Hand-cars on tracks must not be attached to trains in motion; and, when not in use, they must always be kept locked and secured in such a position that they cannot be moved to endanger the safety of trains."

These rules are all perfectly reasonable, and there is nothing in them which a court could regard as vitiating the implied contract of Foutz, and every foreman of track-repairers, that he could comply with them. The only thing in these rules claimed to be vicious and unreasonable is the provision that 401 provides, in substance, that the company shall be under no obligation to give notice to the foreman of track-repairers when extra trains may pass over the road, and that these foremen must always be prepared for them. This is a perfectly reasonable stipulation; for it was proven that it would be impracticable to give such notices to foremen of track-repairers, as such extra trains might and were frequently started after a few minutes' notice to the company or its officers, and it was also shown that the railroad company generally did not undertake to give such notices of when extra trains were to be run, even if they had, in a particular case, ample time to give such notice. But there was nothing to forbid these foremen from getting such information whenever they could conveniently do so. But it was perfectly convenient for them to get such information in very many cases, but not in all; for by another of these rules, it was the duty of these foremen to go to a telegraph office of the company, or see a conductor of the road, every day, and set the watches, so as to have their time always accurate. This alone furnished them excellent opportunities every day to find out whether it was probable an extra train would be run over their part of the road the next day. They might ascertain this in other modes. The foremen of the track-repairers over the section over which Foutz was foreman of track-repairers for a long time ascertained it by getting

an engineer, who went over this section to get coal for his engine every day, to throw out a note to the foreman of track-repairers as he passed him, telling him when the next extra train would pass. This he doubtless had an opportunity daily to find out when he went up to Wellsburg to get coal for his train. There were doubtless other modes by which the foremen of track-layers could frequently get such information if they were on the lookout for it. It was not the duty of the company to give them notice of such extra trains. But they were at liberty to ascertain this in any way they could. And one would suppose, as it was their duty to "run their hand-cars with great caution," they would for their own safety have ascertained, whenever they conveniently could, when an extra train would be run on their part of the track when they intended to have the hand-car put upon the track. The six-mile section over which Foutz was foreman of track-repairers was straight; and doubtless very often there was but little danger of a collision with an extra train, as it could, in bright weather, be seen coming from a distance sufficiently far to enable them to take the hand-car off of the track before the extra train would reach the point where a collision would take place. There can be no question but that Foreman Foutz could have obtained the information that the extra train which killed his own son, and Waldron, the plaintiff's intestate, would be on the track to take home to Wheeling the "Plumed Knights," who had gone on a pleasure excursion to Columbus, O.; and he could easily have found out at what hour this extra train would pass over his section of the railroad. The question of law as to whether Foutz, the foreman of this gang of track-repairers, including Waldron, the plaintiff's intestate, used proper caution, must be answered in the negative. The rules we have quoted, of which he had a copy, gave him not only the power to discharge any hand under him, including Waldron, but, as I understand, he had also the power to employ hands in the place of those discharged, the limitations on his powers in employing hands being "he must not increase his force without the consent of his superior, or the supervisor," who in this case was Mr. Kearns; and he was bound to see that the laborers under him, including Waldron, faithfully performed their duties; and, again, except his superior, the supervisor Kearns, interfered, he had the complete control of the hand-cars furnished him. They could only be used when he was on them, and at other times they were to be kept locked, so as effectually to prevent their use except by the foreman. Surely, then, the company, by these rules, delegated to Foutz its whole power and control over this hand-car; and the hands upon it were put under his charge and control. Whatever duty, then,

the company owed to these laborers on this hand-car was delegated to Foutz, its foreman. And the company, under the law in this State, is bound by the acts or omissions of Foutz in the performance of this duty, to the same extent as if the company itself had done or omitted to do such acts.

I do not feel called upon to cite any authorities to sustain this position ; as I have shown it is a necessary conclusion from a decision recently rendered by this court, especially as the position taken by our court in that case has been substantially re-asserted in the still later case of *Madder v. Railway Co.*, 28 W. Va. 610. This question was again carefully examined in that case ; and, while there are still many States where the position we have taken is not supported, to show the extent to which the law, as I have stated, as to who are co-servants, and when one servant will be regarded as the representative of the master, and not as a co-servant, I will quote a few paragraphs from the opinion of the court in this case delivered by Judge Snyder. After citing some authorities, he says, on pages 618, 619, "The rule deduced from these principles and authorities would seem to be, that two servants of the same master are not fellow-servants when one acts in a superior capacity to the other, in regard to some duty from the master, and the master is liable for any injuries to the subordinate caused by the carelessness or negligence of the superior. At one time it was held, that, to make the master responsible, he must have intrusted this superior servant with the actual control of all his business, — made him *alter ego*. *Brothers v. Cartter*, 52 Mo. 372 ; *Malone v. Hathaway*, 64 N. Y. 5 ; *Willis v. Navigation Co.*, 11 Or. 257 ; s. c., 17 Am. 1 Eng. R. R. Cas. 539. It was subsequently held that this superior servant must have had power to employ and discharge the inferior servant. But it seems to be considered sufficient that the inferior servant is under the control and subject to the orders of the superior servant. *Cowle v. Railroad Co.*, 84 N. C. 309 ; s. c., 2 Am. & Eng. R. R. Cas. 90 ; *Lalor v. Railroad Co.*, 52 Ill. 401 ; *Railway Co. v. Lundstrom*, 16 Neb. 254 ; s. c., 21 Am. & Eng. R. R. Cas. 528 ; *Hough v. Railway Co.*, 100 U. S. 216 ; *Railroad Co. v. Herbert*, 116 U. S. 642 ; s. c., 2 Am. & Eng. R. R. Cas. 407. This modification of the rule was adopted from the first by Ohio and Kentucky courts. *Stone Co. v. Kraft*, 31 Ohio St. 287 ; *Railroad Co. v. Collins*, 2 Duv. 114. It may be said, generally, the only case where the old rule has not been impugned is when the servants are so far working together as to be practically co-operating, and to have opportunity to control and influence the conduct of each other, and have no superiority the one over the other. Since the rule grew up as judicial legislation, the courts may properly qualify or limit it to avoid injustice in particular cases. But the rule seems now

very generally adopted and applied by the courts of this country." See also *Cooper v. Railroad Co.*, 24 W. Va. 37.

Let us now consider whether Foutz, the foreman, was guilty of negligence which caused the death of the plaintiff's intestate.

Whether fore-
man was guilty
of negligence
which caused
intestate's
death.

The law is, as I understand it, that the master, or person who represents him, as Foutz did the railroad company in this case, is bound to use reasonable care and diligence, and make reasonable provision for the servant's safety; and, if he has failed to do this, the master is responsible for an injury sustained as the result of his or his representative's negligence, unless he has contributed to his own injury by not using reasonable care for his own protection, — *Railway Co. v. Fox*, 31 Kan. 586, 3 Pac. Rep. 320; and, if the work the servant is employed in is a particularly dangerous work, the master, or his representative under whose charge the servant is, must not induce him to do the work under the notion that it is less dangerous than the master, or his representative in charge of the servant, either knew it was, or ought to have known if he exercised reasonable diligence. See *Railroad Co. v. Holt*, 29 Kan. 152; s. c., 11 Am. & Eng. R. R. Cas. 206; *Railroad Co. v. Moore*, Id. 633; s. c., 11 Am. & Eng. R. R. Cas. 243; *Keegan v. Railroad Corp.*, 8 N. Y. 175; *Noyes v. Smith*, 28 Vt. 59. The syllabus in the case of *Railway Co. v. Fox*, 31 Kan. 586; s. c., 14 Am. & Eng. R. R. Cas. 325: "At common law the master assumes the duty towards the servant of exercising reasonable care and diligence to provide the servant a reasonable time to work; and, when the service required of the employee is of a peculiarly dangerous character, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duty." And the syllabus of *Hough v. Railway Co.*, 100 U. S. 216: "The master is under obligation not to expose his servants, when conducting his business, to perils or hazards against which they might be guarded by proper diligence on the master's part." And in *Railway Co. v. Lavalley*, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549, the second point in the syllabus is, "It is the duty of a railroad company to make such regulations or provisions for the safety of its employees as will afford them reasonable protection against the dangers incident to the performance of their respective duties." Applying these principles to this case, was Foutz, the foreman, guilty of negligence which caused the death of the plaintiff's intestate? His duty was, among other things, as stated in the railroad company's rules, a copy of which he had, as the railroad company did not undertake to give him notice of the times when extra trains would be run, "to run his hand-car with great caution;" and "he, the foreman,

must always be prepared for them ;” and he was always to be on the hand-car when used, and it was never to be used except by his direction. It is true, as these rules never were furnished or read to Waldron, the plaintiff’s intestate, they could not define or fix the limits of the duty of Foutz, the foreman of the track-repairers, to Waldron, or any of the other laborers under the charge of Foutz. His duties to them were, so far as there were any, such, and only such, as the common law imposed upon him as their master. See *Strong v. Railroad Co.*, 58 N. Y. 56. Those duties I have stated above; and it is obvious they would include those imposed on him by the railroad company, so far as they required him “to run his hand-car with great caution, and to be always prepared for extra trains being run at any time, so far as by reasonable diligence and care he could be so prepared.” It is not pretended that he took any sort of care, or used any sort of diligence, to prepare for the extra train which ran over his hand-car and killed Waldron.

It may be said, that, as the railroad company was not bound to have him notified of the coming of this or of the other extra trains of cars, he could not be prepared for its coming; and he could do nothing whereby he could prepare himself for meeting such extra train, but had to take the chances, as did the laborers under him, of coming into collision with this or any other extra train, as one of the risks ordinarily incident to his business; and, if such collision ever took place with any extra train, it would be in law regarded as an accident for which there could be no responsibility. Is this true, in point of fact, according to the evidence in this case before the jury? It seems to me it obviously was not; for by the rules of the company, a copy of which he had, it was his duty every day to go to the nearest telegraphic station of the company, or see a conductor of a train, to set his watch by the railroad time. If he did this duty, — manifestly a very important one to promote the safety of the laborers under his charge, Waldron included, — he would have daily opportunities to inquire of persons likely to know, or at once, in case of the telegraphic operators, able to ascertain, when the next train would pass along; and, of course, every danger of a collision with such extra train as he was informed would next pass over the railroad could, by the use of any caution as to the time he put his hand-car on the track, be entirely avoided. Again, he ought, as he himself had formerly done, if the opportunity offered, to have asked some one to get this information for him. He had formerly an understanding with the engineer of a steam-engine which went up to Wellsburg daily, to get coal for his engine, to find out there, it being a telegraphic station, when the next extra train would pass

very generally adopted and applied by the courts of this country." See also *Cooper v. Railroad Co.*, 24 W. Va. 37.

Let us now consider whether Foutz, the foreman, was guilty of negligence which caused the death of the plaintiff's intestate.

Whether fore-
man was guilty
of negligence
which caused
intestate's
death.

The law is, as I understand it, that the master, or person who represents him, as Foutz did the railroad company in this case, is bound to use reasonable care and diligence, and make reasonable provision for the servant's safety; and, if he has failed to do this, the master is responsible for an injury sustained as the result of his or his representative's negligence, unless he has contributed to his own injury by not using reasonable care for his own protection, — *Railway Co. v. Fox*, 31 Kan. 586, 3 Pac. Rep. 320; and, if the work the servant is employed in is a particularly dangerous work, the master, or his representative under whose charge the servant is, must not induce him to do the work under the notion that it is less dangerous than the master, or his representative in charge of the servant, either knew it was, or ought to have known if he exercised reasonable diligence. See *Railroad Co. v. Holt*, 29 Kan. 152; s. c., 11 Am. & Eng. R. R. Cas. 206; *Railroad Co. v. Moore*, Id. 633; s. c., 11 Am. & Eng. R. R. Cas. 243; *Keegan v. Railroad Corp.*, 8 N. Y. 175; *Noyes v. Smith*, 28 Vt. 59. The syllabus in the case of *Railway Co. v. Fox*, 31 Kan. 586; s. c., 14 Am. & Eng. R. R. Cas. 325: "At common law the master assumes the duty towards the servant of exercising reasonable care and diligence to provide the servant a reasonable time to work; and, when the service required of the employee is of a peculiarly dangerous character, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duty." And the syllabus of *Hough v. Railway Co.*, 100 U. S. 216: "The master is under obligation not to expose his servants, when conducting his business, to perils or hazards against which they might be guarded by proper diligence on the master's part." And in *Railway Co. v. Lavalley*, 36 Ohio St. 221; s. c., 5 Am. & Eng. R. R. Cas. 549, the second point in the syllabus is, "It is the duty of a railroad company to make such regulations or provisions for the safety of its employees as will afford them reasonable protection against the dangers incident to the performance of their respective duties." Applying these principles to this case, was Foutz, the foreman, guilty of negligence which caused the death of the plaintiff's intestate? His duty was, among other things, as stated in the railroad company's rules, a copy of which he had, as the railroad company did not undertake to give him notice of the times when extra trains would be run, "to run his hand-car with great caution;" and "he, the foreman,

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over the road; and to inform him by throwing off a note to him (the foreman) as the engine came back from Wellsburg, and passed the point where the foreman and the hands under him were at work on the railroad. But this steam-engine had, before this accident, ceased to go up to Wellsburg daily after coal; and therefore Foutz, if he had desired it, could not have adopted this mode of getting information as to when the next extra train would pass over his section. But this shows, nevertheless, that he formerly thought it his duty, in being always prepared for extra trains, as the rules required him to be, to make such inquiries about them whenever he could. But Foreman Foutz negligently, on the occasion of this accident, failed, so far as the evidence discloses, to make any such inquiries, though if he set his watch, as the rules required, he could, without any trouble, have made inquiries of the conductor of a train, or of a telegraphic operator of the company, when the next extra train over his section would be started. In all probability the conductor of a train could have told him, as the arrangements had been made for running this extra two days before it was started; or if it was to the telegraph office he went to get his watch set by the railroad time, it is certain the telegraph operator could have told him this extra train would be run in the morning of Oct. 4. As he lived in Wheeling, and a large number of "Plumed Knights" had gone to Columbus on an excursion, I suppose he knew it, and also that they would be coming back on Oct. 4, 1884; and, had he been a prudent and a cautious man, he might well have thought that it was not unlikely they would be coming back on an extra train, and he could have found out whether they would, and, if they did, whether it would come over his section of the road, by inquiring of Mr. Tomlinson, the passenger agent of the railroad company, with whom arrangements for such special trains would have to be made; and he lived in Wheeling, and could have given all the necessary information if he had been called upon by Foutz, the foreman. But if it were admitted that Foutz, for any reason, did not have an opportunity of conveniently ascertaining when an extra train would be run over his section of the road on the morning of Oct. 4, 1884, when this accident occurred, it would not in the least alter the case. There was no urgent necessity for any of the hands under him to go to work on the road on Oct. 4, 1884. This is shown by the fact that he gave them all leave to attend that day the Democratic parade, which was to take place that day, if they chose; and all his hands, except his son and Waldron, the plaintiff's intestate, accepted the leave and remained in Wheeling. The morning of Oct. 4, 1884, being very foggy, and Foutz having made no inquiries, and having no information that an extra train

would not be run over this section, and having made no preparation for such a train, it was obviously negligent in him to have his hand-car put on the track, and travel on it more than three miles, and permitting his son and Waldron to get on this hand-car with them, without informing them that in so doing they were running more than the ordinary risks incident to their business of track-repairing. Had he done so, Waldron might have declined to get on the car; and, like the rest of the hands, staid in Wheeling that day; but after being told by the foreman that he had not made any inquiries as to whether an extra train would be on the track, and made no preparations to prevent an accident, if one should happen, Waldron had still chosen to get upon this hand-car, it is obvious that Foutz and the railroad company, his principal, would have been relieved of all responsibility, even though Foutz had been negligent in making no such inquiries, or any other preparation for meeting an extra train on the track. Of course, if Waldron, the plaintiff's intestate, was careless and negligent, and thereby contributed to bring about this accident, the plaintiff could not recover in this suit.

Was Waldron guilty of contributory negligence? The law, as I understand, is, that a workman or servant, in entering upon any employment, is supposed to know and assume the risk naturally incident thereto; for it is neither unjust nor unreasonable that the consequences which a servant or workman must have foreseen on entering into an employment, and which due care on the part of the master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen through the negligence of the master or his representative, such as Foutz was in this case. So far as the management and control of the hand-car, and the hands under him, he was the master, and the hands under him were servants, and the company whom Foutz represented was responsible for any injury suffered by his hands on his hand-car, under his immediate control, which resulted from his negligence, if his hands on the hand-car were guilty of no negligence. They had no control in the matter. They act in subordination to him. They have a right to rely on his judgment as to when it is prudent to put the hand-car on the track, and get upon it with the foreman. They have no opportunity or means of knowing whether any extra train is likely to be met by them while the hand-car is conveying them to their work. It is true they assumed the risk, which was considerable. But they had a right to assume that all proper attention would be given to their safety, and that they would not be carelessly and needlessly exposed to risks, not necessarily resulting from their occupation,

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to give them such notices, but each foreman was required by the rules to be always prepared for these extra trains. They run at very irregular times; but on this section of Foreman Foutz, they run on an average two or three times a week. The railroad company, by its rules, gave no directions to these foremen when they might put these hand-cars, furnished each of them, on the railroad, to carry laborers under their respective charges to and from their work, but it left this entirely to the judgment and sound discretion of these foremen. But they were required to run these hand-cars with great caution, and never permit them to be put on the railroad track unless the foreman was personally upon it in charge of the laborers; and to prevent this effectually, these hand-cars, when not on the railroad track, were required to be kept locked by the foreman, and they were positively forbidden to be attached to running trains by the foreman. They were to keep a sharp lookout for these extra trains, and protect themselves by signal at all dangerous points, and were never to run within twenty minutes' time of a regular passenger train. These directions show that the power imposed on these foremen to put these hand-cars on the railroad track at their discretion was one which necessarily required the exercise of the greatest precaution and prudence on the part of the foreman.

More or less risk was always run when these hand-cars, carrying the foreman and the laborers in his charge, were on the railroad track, as it was impossible to tell when they might be met or run over by a wild engine or extra train. But the foreman, if on the alert, could greatly reduce this risk, as he could by inquiry ascertain certainly when most of these wild engines or extra trains were expected to be run over his section. And these foremen had excellent opportunities, if they duly appreciated the danger, to diminish it largely by making such inquiries; for by the rules they were to see a conductor of a train, or go to the nearest station and see the telegraphic operator every day, and set their watches correctly with the railroad time. This was absolutely necessary; for otherwise the danger of these hand-cars being run over, or coming in collision with regular trains, would be great. These conductors of trains would generally know what extra passenger trains would run over the road the next day, if any, and what time of the day they would run over the particular section of each foreman; and the telegraphic operator could tell with accuracy, by proper inquiries, when it was expected that wild engines or other extra trains would be running over the railroad track the next day. These foremen frequently had other opportunities, besides these, of informing themselves about when it was expected to run extra trains or wild engines over their sections of the road. Thus, in this case, it was shown that Foutz, for two

years, had such opportunities, by getting an engineer, who went up from Wheeling to Wellsburg with the yard engine for coal, to notify him when he would be along with his engine. This was done by this engineer or the yard-master sending a man on the regular train which went up before him, and directing him to throw off a note addressed to Foutz, the foreman, written, informing him when this yard engine would go up the track. This note would be always received by the foreman, Foutz, as he would be at work with his laborers somewhere on the track. By proper prudence and caution these foremen could by inquiries in advance, as to when these extra trains or wild engines would be run, of the train conductors or telegraphic operators, one of whom he was bound to see every day, and by inquiries of others as opportunities offered, thus diminish the danger of his hand-car meeting or being run over by an extra train or wild engine very much. Probably, if the foreman was thus on the alert, as it was obviously his duty to be, in being prepared always for such extra trains, as the rules of the company required him to be, he would reduce the risk which he and his hands ran by more than one-half. Of course, they could not avoid all such danger by any amount of diligence, as a wild engine or extra train of some sort might occasionally be started over the track without any officer of the company having more than a few minutes' notice when it was to start. Such were the dangers run by putting these hand-cars on the railroad, and such the duties imposed on the foremen of these repairing gangs of laborers to diminish these risks. If such diligence was used, and inquiries were made, and the day was a bright one, so that the train could be seen either way for a considerable distance, the risk run by using this hand-car would not be very great, as the probability of meeting an extra train or wild engine would be much reduced by the information the foreman would have gotten in advance by such inquiries; and if it should chance that, nevertheless, an extra train or wild engine was met, the hands on the car, if the day was bright, could get off it before the collision, and even have time, in many cases, to get the hand-car off the track in time to avoid a collision. The laborer under the foreman could, from what we have shown to be the law, be fully justified in presuming that his foreman would never have directed or permitted his hand-car to be put on the track on a very foggy morning, unless he had in some manner been satisfied by inquiry, the day before, that it was very improbable that any sort of extra train would be on the portion of the section over which he proposed to run his hand-car. These laborers under a foreman, having no opportunity to learn any thing about when extra trains or wild engines would probably pass over their section of the railroad, would naturally and very properly leave to their

foreman to determine when a hand-car could with a reasonable degree of safety be put upon the road. The railroad company had left it entirely to his discretion and sound judgment. He was required to be on the car with them, so that he ran the same risk in travelling on the hand-car that the laborers in his charge did. The railroad company, having thus wisely left it solely to his judgment, can hardly complain that the laborers under his charge should also trust to his sound judgment and prudence, and make no inquiries of him, as to whether or not he had been on the alert to ascertain whether any extra trains were expected, by a previous arrangement, to run over their section at the time they would be on the hand-car. They had clearly, under the law as I have stated it above, a right to presume that he had done all that a prudent man could do to diminish the risk that both he and the hands in charge ran by putting the hand-car on the track.

Now, what were the facts in this case? Foreman Foutz had, the evening before, told all the hands under his charge, that, if any of them wished not to go to work on the railroad the next day, the 4th of October, 1884, they need not do so if they wanted to remain in Wheeling on that day, to be present at a Democratic parade to be had there. All of them except Waldron concluded to remain in Wheeling on that day. The next morning, directly the passenger-train went up the river from Wheeling, Foutz, his son, about thirteen years old, and Waldron, put his hand-car on the railroad track to go up to their work, some three or four miles north of Wheeling. Foutz, it turns out, had made no inquiries whatever the day before as to whether there had been any arrangement made by which an extra train would be run over his section of the road that morning. Had he made such inquiry of the train conductor, or of the telegraph operator at the nearest station, he would certainly have ascertained that this extra train carried the Plumed Knights of Wheeling from Steubenville to their home, and which would certainly be on the track that morning, as the arrangement had been made for this as far back as the evening of Oct. 2, 1884; that on the same day, before the extra train was put on the track, the arrangement had been made by these Plumed Knights with the passenger agent of this railroad company in Wheeling, before they left, to go to Columbus on an excursion. Doubtless the train conductor, whom Foutz ought to have seen on the day before to set his watch by the train time, or the telegraphic operator, if he called on him to set his watch, could either of them have told him of this extra train. In fact, the wonder is that he did not learn the day before, even if he neglected his duty, and did not set his watch, as he ought to have done, and thus did not see a train conductor or a telegraphic operator; for that extra train bringing

Facts on the
case reviewed.

back these Plumed Knights would be back to Wheeling early on the 4th of October, 1884, when the Democratic parade was to have taken place, must have been known to a great many people in Wheeling, where all these Plumed Knights lived. Foutz must have been very far from being on the alert, or he could hardly have failed to learn that this extra train would come down the track that morning. He lived in Wheeling, and this was known to very many persons. It is strange he did not hear of it, whether he made an inquiry or not. The morning of the 4th of October, 1884, when Foutz had this car put on the track, and his son and Waldron got on it to go three or four miles up the railroad to their work, Foutz, though he had been thus grossly negligent of his duty in making no inquiries as to whether any extra train was expected to be running over his section that morning, said not a word to Waldron about his having neglected to make any inquiries as to such extra trains, but permitted him to get on this hand-car in utter ignorance of the neglect of this duty by his foreman. The inevitable result was, that there was a collision between this hand-car and this extra train, carrying these Plumed Knights of Wheeling, whereby Waldron, the plaintiff's intestate, as well as Foutz's son, were killed.

Now, on the principles of law I have laid down, was Waldron guilty of negligence in getting on this hand-car that morning? Of course he assumed, as he had a perfect right to do, that Foutz, his foreman, had in some way ascertained the day before that no arrangement had been made for running an extra train over this section of the road that morning. He knew that Foutz had the means of getting such information, as he had every reason to believe that he would avail himself of these means. He knew that for nearly two years, whenever a yard engine went up from Wheeling to Wellsburg to get coal, that his foreman, Foutz, always learned when such engine was to go up or come back, and he knew he had to set his watch to the railroad time every day, and that he had these and other opportunities of learning about extra trains and wild engines, while he had no opportunity whatever. Under these circumstances, it was not his duty to make any inquiry of Foutz whatever. He had, as we have seen by the law, perfect right to presume that Foutz knew that no extra train was expected on the track this morning. Foutz's conduct was a strong assurance to him that this was the fact. His conduct in having the hand-car put on the track that foggy morning, and getting on it with his hands, would certainly induce them to feel sure that no extra train had been previously arranged to run over the track that morning. He certainly lulled Waldron into a sense of perfect security, so far as any extra train of passenger-cars were

**Waldron held
not guilty of
contributory
negligence.**

concerned. In this respect he much more fully lulled Waldron into a sense of security than was done by the master to his servant in *Tarrant v. Webb*, 18 C. B. 797, before referred to. It was the duty of Foutz to have warned Waldron of the danger he was running of meeting some passenger extra train, and told him he had failed, the day before, to make any inquiry whether any extra train was expected to be on the track by previous arrangement that morning. Then Waldron would have been put on the same footing, or nearly the same footing, that Foutz was, in judging of the danger which he was running in getting on the car that morning. Had he done so, who can say that Waldron would not have declined to get on the car, and remained that day, as his co-laborers did, in Wheeling? Waldron had never voluntarily assumed the risk of running into collision with a passenger extra train which had been days before arranged to run over the track that morning. He did not imagine he was incurring any risk of this character. He knew he might have a collision with a wild engine, or some engine and cars used for the company's work. This danger, as well as the danger of starting out on so foggy a day, he was willing to assume, and did so voluntarily. But he suffered no injury from assuming risks of this sort. He was killed by an extra passenger-train, which had been arranged to run over this section of the road two days before. Such risk he never assumed; and he had no idea he was running any such risk, as the conduct of his foreman, Foutz, had lulled him into perfect security, so far as a danger of this sort was concerned. He trusted him, and presumed he had done his duty. And this we have seen the law fully justified him in doing. He was therefore not guilty of contributory negligence in bringing about the particular collision whereby he lost his life. It was caused by the negligence of Foutz, the foreman, alone. And the railroad company, the defendant below, is liable for the resulting damages caused by the negligence of one who was in this matter its representative.

It may be said, that, in reaching this conclusion, I have ignored a number of cases which in their facts strongly resemble the case

Cases in which
contrary conclusions are
reached
reviewed.

under consideration, and in which contrary conclusions were reached by highly respectable courts. I propose now to review these cases. The first of these cases is *Clifford v. Railroad Co.*, 141 Mass. 564. The syllabus is: "A section hand in the employ of a railroad corporation cannot maintain an action against a corporation for personal injury caused by a collision between a hand-car on which he was at work, and an engine of a train run by servants of the corporation, if the accident was occasioned by the negligence of the section boss, and of the engineer of the

train." The facts were similar to those of the case now before us, except that the section boss or foreman in that case was negligent, as in this; but the engineer of the extra train was also negligent, which he was not in the case before us. The reason assigned for the conclusion reached, as appears in the opinion of Chief Justice Morton, was, to use his language, "This was negligence of fellow-servants, and it is the settled law of this Commonwealth that he can maintain no action against the corporation for injuries caused by such negligence. *Hodgkins v. Railroad Co.*, 119 Mass. 419, and cases cited." In this State, as I have shown, it is settled law that Waldron was not a fellow-servant with the engineer of the express-train, nor was he a fellow-servant of the section boss or foreman, Foutz. If the case before us had happened in Massachusetts, under their well-settled law as to who are fellow-servants in the employment, it would, as under such law it ought to, have been held that the railroad company was not responsible to the plaintiff's intestate in this suit. But our law as to who are fellow-servants of a railroad company is settled entirely different from the law in Massachusetts. In fact, it is settled in direct opposition to all the Massachusetts decisions. This case, therefore, is, of course, entitled to no consideration by our court. The case of *Railroad Co. v. Wachter*, 60 Md. 395, s. c., 15 Am. & Eng. R. R. Cas. 187, resembles also the case before us, except that, so far as the case shows, there was no rule of the company putting the control of the hand-car under the absolute control of the foreman of the gang of repair laborers. And there were two additional facts in that case: The laborer, one of the repair gang, had read the rules of the company; and lastly, the head-light was not exposed in front of the engine, as it was expressly required to be by the rules of the company, and in the case before us it was so exposed. It is obvious, from the reading of the case, that the foreman and the hands under him or with him, and also the engineer of the extra train, were all regarded as co-servants, under the Maryland decisions; and therefore the conclusion that the railroad company could not be responsible was clearly right, according to the settled law of Maryland. But in this State, as neither the engineer of the extra train nor the foreman were co-servants with the hands under the charge of the foreman, this Maryland decision is entitled to no consideration. To show this diversity between our decisions and the Maryland law, as settled by their decisions, I need but quote a paragraph from this decision, found on p. 401. The court says, "Then, again, it was argued the morning was very foggy, and the head-light was not exposed in front of the engine. This, however, was the fault of the person in charge of the train, for the rules of the company expressly require the

head-light to be exposed in foggy weather; and for negligence of such person the company is not responsible, unless it failed to exercise proper care in the selection or retention of such person; and on this question there was no evidence." Throughout the entire opinion, the foreman and the hands with him on the car are treated as if they were co-servants. There is no sort of suggestion that such foreman could be regarded as other than as a co-servant with the other hands. This seems to be assumed as indisputable; and doubtless in Maryland, according to their decisions, it cannot be disputed; and, if such were our law under our decisions, of course the plaintiff's intestate would not recover in this suit of the defendant company.

There are two cases; however, — one in Ohio, and one in Rhode Island, — bearing some resemblance to the case before us, which do not seem to be based on the difference between the law in this State and in those States as to who are co-servants among the employees of a railroad company. They are *Railway Co. v. Leech*, 41 Ohio St. 388, and *McGrath's Adm'r v. Railroad Co.*, 14 R. I. 357. The opinion of the court, which is very brief, will show the character of the cases, and the grounds on which it was based. "The evidence shows that the deceased had lived near Read's mill for several years, and had the same opportunity to know, in regard to the situation on the morning of the accident, as the foreman, Lotus, and other members of his crew. It does not appear that he rode upon the car by any command or coercion from his superior. The car was provided for the convenience of the men in getting to their work. The men mounted the car without objection; the deceased was as willing as the others. So far as any thing appears, all were ready to take the risk from delayed trains, without the delay of sending to the telegraph office, one mile away, which would have protected them. There was no negligence in the running of the train nor in the running of the hand-car. As the deceased voluntarily and without objection assumed the risk, his representatives cannot recover." This decision is based on the ground that the foreman, Lotus, and his hand, Davis, each knew, and one as well as the other, what dangers they were running in getting on the hand-car. The accident occurred by coming in collision with a regular train which had been delayed. Both of them knew what was the regular time when this train should pass; but neither knew, or had any opportunity of knowing, whether it had passed or whether it was delayed. They both took it for granted it had passed. The court based its decision on the ground that both the foreman and the laborer under him had the same opportunity to know what risk they were running from the chance of their coming in collision with this train, and both were willing to take

this, rather than be delayed while a messenger was sent a mile to the telegraph office to learn the facts about whether this train was on time, and had passed or was delayed. Now, I expressly base the liability of the company, in the case before us, on the ground, in this case, that the foreman, Foutz, had far better opportunity to ascertain whether any extra train was expected to pass the morning of the 4th of October, 1884, over his section, than his laborer under him, Waldron, who had no opportunity; and that Waldron did not know as much about the risk of starting on this car as he ought to have known if Foutz had told him the extent of his information, or, rather, want of information; and his failure to do so increased the risks which Waldron voluntarily assumed, as he supposed. I think the two cases are, in that important respect, different. The Rhode Island case is *McGrath's Adm'r v. Railroad Co.*, 14 R. I. 357. The rule of the railroad company was, "that foremen may expect a train in either direction, without signal being shown for it, and will use every precaution to insure safety." The laborer who was killed knew this rule. The work of the day was finished, and the foreman said to his hands there was twenty minutes before the next incoming regular train, which was time enough to reach the next station before it came along. The court says "that thereupon they mounted the car without objection, the intestate as willingly as the others; all of them, for any thing which appears, being willing to take the risk without the delay of sending out red flags, which would have protected them, apparently because they were in a hurry to get home, as it was Thanksgiving Day. There was no carelessness in the management of the special train after the hand-car was discovered. The accident may be attributed to two causes; to wit, neglect on the part of the hand-car to send out the red flags, or take other sufficient precautions, and an omission on the part of the company to signal the coming of the special train. The defendant accepted both risks, — the first by riding on a hand-car willingly and without objection, knowing that the flags had not been sent out, or other precautions taken; the second by riding, then knowing of rule 24, which permitted the despatch of special trains without signalling in advance. By continuing in the service after being informed of the rule, he accepted the risk of such unsignalled special trains as one of the risks of the service." Waldron, the repair hand in the case before us, as in the Rhode Island case, accepted both the risk arising from not sending out, on Oct. 4, 1884, red flags, or taking other precautions, that morning, by riding on the hand-car willingly and without objection, knowing that flags had not been sent out, or other precautions taken, that morning; and he

also accepted the risk of encountering any extra train or wild engine which might be on the track, and which the foreman, Foutz, could not, by the use of opportunities which he had, ascertain would probably be on the track, and come into collision with the hand-car. And the evidence in the case before us shows that this extra train from Steubenville, with the Plumed Knights on it, was an extra train, which he had opportunities, if used by him, to have ascertained would be on his section of the track, and probably come into collision with his hand-car. And, in fact, it did so, and caused the death of Waldron. This Rhode Island case seems to me to be sound law, provided the foreman had not negligently failed to ascertain, when he had the opportunity, that this extra train would be on the track over which he was to pass with the hand-car about that time, so as to render a collision with it probable. The statement of the case simply shows that it was a special train from Providence. The burden of proving that this special train had been arranged to be put upon the track a sufficient time before Nov. 29, 1879, when the accident happened, for the foreman, if he had been cautious, to have ascertained, by opportunities which he must have had, when it would be on the track, was, of course, on the plaintiff below, the administrator of the laborer who was killed. So far as the case shows, there was no proof on this point; and, if so, the decision is in entire accord with the views I have expressed. And the same may be said of the case of *Railroad Co. v. Leach*, 41 Ohio St. 388. It is not claimed, that, if the plaintiff below had a right to recover, the damages awarded by the jury were excessive. The court, therefore, properly overruled the motion for a new trial, and rendered a judgment in accordance with the verdict of the jury.

The judgment of the Circuit Court, rendered May 29, 1886, must be affirmed, with costs and damages, according to law.

Johnson, P. J., and Snyder and Woods, JJ., concurred.

See generally as to whether Foreman and Subordinates are Fellow-Servants. — *McCasker v. Long Island R. Co.*, 5 Am. & Eng. R. R. Cas. 564; *Fraker v. St. Paul, etc., R. Co.*, 15 Ib. 257; *Chicago, etc., R. Co. v. May*, and note, 15 Ib. 320; *Willis v. Oregon R. & N. Co.*, 17 Ib. 539; *Peschel v. Chicago, etc., R. Co.*, 17 Ib. 545; *Chicago, etc., R. Co. v. Miranda*, 17 Ib. 564; *Gilmore v. No. Pac. R. Co.*, 15 Ib. 304; *Hannibal, etc., R. Co. v. Fox*, 15 Ib. 325; *Smith v. Sioux City, etc., R. Co.*, 17 Ib. 561; *Gonsior v. Minneapolis, etc., R. Co.*, 28 Ib. 551, n.; *McDermott v. H. & St. Jo. R. Co.*, 28 Ib. 528; *Couch v. Charlotte, etc., R. Co.*, 28 Ib. 331; *Kirk v. Atlanta & C. A. L. R. Co.*, 25 Ib. 507; *Rochester, etc., R. Co. v. Brick*, 21 Ib. 605; *McKinnie v. California So. R. Co.*, 21 Ib. 539; *Capper v. Louisville, etc., R. Co.*, 21 Ib. 525. *Wabash, etc., R. Co. v. Hawk*, 31 Ib. 306.

Foreman in Machine-Shop and Boy Apprentice are not Fellow-Servants. — In *Missouri Pac. R. Co. v. Peregoy*, 36 Kan. 424, it was held that where an ignorant boy, seventeen years old, an apprentice in a machine-shop, was directed

by the foreman in charge to obey the call and direction of W., another employee engaged in drilling an engine-frame, which work required a skilled mechanic to safely handle, and W., being also an unskilled apprentice, negligently removed the clamp that was provided to hold the frame from falling, and in that position attempted to move the engine-frame, directed the boy to move the trestle farther under the frame, when it fell and killed the boy, W. and the boy were not fellow-servants, and that the negligence of W. was the negligence of the employer.

The counsel in this case insisted that the judgment could not be sustained unless the defendant knew that Wirth was incompetent; and on this point the court below instructed the jury as follows: "And for the purpose of determining whether or not it was known, it will be necessary for you to take into consideration what the agents and servants and employees of the defendant knew, or might have known by the exercise of ordinary and reasonable care on their part, from the number of times they were present when he was at work." The evidence in support of this, and under which this instruction was given, was that Haynes, the master-mechanic, and Wood, foreman of that part of the shop, knew that Wirth was an apprentice, and that he had never been put to such work before, and that he was a mere boy; had seen him working that day drilling on the engine-frame in question with the clamp off; and the further proof that it required a skilled mechanic to safely do the work so as to avoid accidents. The defendant, through their agents Haynes and Wood, knew that Wirth was unskilled, and with this knowledge placed him in charge of work that required skill and practice to successfully and safely handle. But counsel insisted that this instruction comes within the case of *Solomon Ry. Co. v. Jones*, 30 Kan. 601; s. c., 15 Am. & Eng. R.R. Cas. 201. In that case damages were claimed for injuries received by an employee or servant by the breaking of a handle of a hand-car; and the evidence showed that on the day previous this car collided with another hand-car, and that these hand-cars were in use by a large number of hands. All except three were co-laborers. Some of these employees testified to having noticed the defect in the car after the collision; but this knowledge was not known by the railroad company, and was not brought to the knowledge of such agents as would be knowledge of the company. The instructions, being general, were considered error; while in this case the language is almost identical with that case, but based upon a different state of facts.

The court, by Clogston, J., said, "In this case the incompetency and inexperience of Wirth was well known to those to whom notice was notice to the defendant. So the fact, also, of the manner in which the engine-frame was handled, being known by the master-mechanic in charge, this knowledge was a notice to the defendant also. While it is true that one of the foremen of the blacksmith-shop, an employee in a different department of the shops, a short time before the accident happened, noticed the negligent manner in which Wirth was handling the frame, and called his attention to such negligence; but this foreman had no authority in this part of the shop, and this notice was not notice to the company. And while this instruction was general in its nature, yet, framed upon the facts in this case, we cannot see how the jury could be misled. The actual notice having been given and shown and brought home to such agents of the defendant, they were bound to take notice; and a failure to do so was the failure of the defendant.

But Foreman and Gang of Repair-Men are Fellow-Servants in Nebraska. — The foreman of a company of men engaged in the business of repairing bridges, water-tanks, and telegraph wires on a line of railway, who has power to control and direct the movements of his men, will render the company liable for acts of negligence committed by him in the course of his employment, whereby one of the men under his control, without his fault, is injured. *Sioux City & R. R. Co. v. Smith* (Neb.) 36 N. W. Rep. 285, citing *Railway v.*

Lundstrom, 16 Neb. 254; Burlington, etc., R. Co. *v.* Crockett, 19 Neb. 138; s. c., 24 Am. & Eng. R. R. Cas. 390.

And in Tennessee.—In Louisville & N. R. Co. *v.* Lahr. (Tenn.) 6 S. W. Rep. 663, plaintiff, a carpenter, working on a railroad trestle, intending to descend to a lower bent, asked the foreman of his gang, who was above him on the trestle, if a certain hanging rope was made fast. On answer that it was, plaintiff swung himself off; and, the rope being loose, was thrown to the ground, and injured. It appeared that plaintiff's descent was without orders of the foreman, and might have been made another way; that he did not tell the foreman of his intention to descend, and that no duty rested on the foreman to see to the means of descent. *Held*, that the foreman's negligence was merely personal, and not as of a vice-principal, and that plaintiff could not recover from the railroad company.

This case draws, or rather recognizes, a clear distinction between the mere personal negligence of a superior fellow-servant and his negligence in a matter in which he stands in the place of the master, who, under the law, owed a duty in that matter to the servant; the court saying, "When, however, the inferior is injured while executing a lawful command of his superior, or where the superior represents and stands for the master, and has a right to control the movements of the train and of all the employees, in all such cases the rule *respondeat superiore* applies with reference to any injury resulting from the official negligence of such superior. Railroad *v.* Bowler, 9 Heisk. 866; Railroad *v.* Collins, 1 Pickle, 227. The true distinction, we think, is drawn; and by it our case may be summarized by Judge Cooper, who says, "In order to charge the master, the superior servant must so far stand in the place of the master as to be charged, in the particular matter, with the performance of a duty towards the inferior servant which, under the law, the master owes to such servant." Railroad *v.* Handman, 13 Lea, 423. To the same effect is the rule as stated by Judge McFarland, who says, "The plaintiff must show that his injury resulted from the carelessness or want of skill of some one who, in the particular matter, stands in the place of the master." Railroad *v.* Wheless, 10 Lea, 748.

Engineer and Trackmen are Fellow-Servants.—A railroad company is not responsible to its section or track men for the negligence of the engineer or brakeman of a train, they being fellow-servants. Connelly *v.* Minneapolis E. R. Co., (Minn.) 35 N. W. Rep. 582. Citing Foster *v.* Railway Co., 14 Minn. 360; Brown *v.* Railway, Co., 29 Minn. 162; Fraker *v.* Railway Co., 32 Minn. 54; S. C. 15 Am. & Eng. R. R. Cas. 256.

A track repairer and an engineer of an elevated railroad company are fellow-servants, and for a personal injury resulting to the former while in the course of his employment, solely from the negligence of the latter in running his train at too high a rate of speed, the company is not liable; such negligence of the engineer being one of the natural and ordinary risks incident to the track repairer's employment. Van Wickle *v.* Manhattan R. Co., 32 Fed. Rep. 278.

Engineer and Switchmen are Fellow-Servants.—In an action against a railway company for the death of plaintiff's intestate, who was an engineer, it appeared that the death was caused by the negligence of a switchman who left a switch open. *Held*, that the engineer and the switchman were fellow-servants. Naylor *v.* New York Cent. R. Co., 33 Fed. Rep. 801.

But Engineer and "Overhauler" of Cars are not Fellow-Servants in Virginia.—An employee of a railroad company received injuries while executing his duties as "overhauler" of cars, through the negligence of the engineer of a shifting engine employed by the same company. *Held*, that the two employees being engaged in different departments were not fellow-servants in the sense which would relieve the employer from liability for an injury suffered by one through the negligence of the other. Richmond & V. R. Co. *v.* Norment (Va.) 4 S. East Rep. 211.

Brakeman and Firemen are Fellow-Servants. — In an action against a railroad for the death of a fireman in a collision caused by a misplaced switch, it appeared that a brakeman had properly placed the switch, and one train had passed safely by shortly before the collision. Evidence for plaintiff tended to show that this brakeman had proved careless and incompetent on other occasions, but not on the occasion of the collision. Plaintiff did not prove carelessness on the part of any one else, nor that the switch could have been misplaced by the train which passed. *Held*, that the court should have charged the jury to find for defendant. *Galveston, H. & S. A. R. Co. v. Faber* (Tex.) 8 S. W. Rep. 64.

And Brakeman on one Train and Employees on another Train. — A brakeman on one train of a railroad company is the fellow-servant of the employees in charge of and operating another train of the same company, and cannot recover for injuries caused by the negligence of the employees operating such other train. *McMaster v. Illinois Cent. R. Co.* (Miss.), 4 So. Rep. 59.

But Brakeman on Material-Train is not Fellow-Servant of Trackmen. — In *Torians v. Richmond & A. R. Co.* (Va.), 4 S. East. Rep. 339, an action to recover damages against a railroad company for the negligent killing of plaintiff's intestate, while in the employ of such company as brakeman on a material-train, it was shown that the immediate cause of intestate's death was the rapid running of the train, suddenly accelerated by putting on additional steam, over a track left in an uneven and weakened condition by other employees of the defendant company, whose duty it was to repair the track in question, and who failed to give warning of the dangerous condition of the road. *Held*, that the negligence of such employee was the negligence of the company, and that plaintiff's intestate was not a co-employee.

The court said, "The law of the case is well settled. It is laid down by this court in the case of *Moon's Adm'r v. Railroad Co.*, 17 Am. & Eng. R. R. Cas. 531, and the authorities there cited, as well as in subsequent decisions by this court. It was the duty of the defendant company, the defendant in error, to have and maintain good and safe machinery, structures, and roadway. This company's charter required it to maintain a railway which should be first-class in all respects. It was its duty to each of its employees to use care and caution in the exercise of its privileges and powers, in selecting its agents and servants, and to use all reasonable precautions, including necessary signals to moving trains, essential to the protection of the lives and limbs not only of employees, but to the protection of all persons lawfully on its road. The defendant company, by and through the negligence of its agent, Herndon, in failing to signal the approaching train, and warn it of the danger in its path, was guilty of culpable negligence, which caused the accident that resulted in the death of plaintiff's intestate; and for that negligence and that result the company is liable in damages. That negligence was the proximate cause of the death of plaintiff's intestate, who was not the co-employee of Herndon, by whose negligence the accident was caused, in the sense which relieves the employer from liability for injuries to one servant by and through the negligent act or omission of his fellow-servant."

Machine Inspector and Employee in Car-Shops not Fellow-Servants. — Where a company employs a person to inspect, repair, and provide machinery for others to operate who are employed by the same company in its car-shops, he stands in the place of master to those who operate such machinery, rather than that of a fellow-servant. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592.

Nor are Expressman and Baggage-man on Passenger-Train Fellow-Servants with Employees of a Freight-Train. — This was decided in the case of *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 616. Judge Allen, after citing and reviewing the cases of *Priestly v. Fowler*, 3 Mees. & W. 1; *Farwell v. Railway Corp.*, 4 Metc. (Mass.) 49; *Flike v. Railroad Co.*, 53 N. Y. 549;

Corcoran *v.* Holbrook, 59 N. Y. 517; Rolling-mill Co. *v.* Johnson, 114 Ill. 57; Railroad Co. *v.* Keary, 3 Ohio St. 201; Railway Co. *v.* Ross, 112 U. S. 377; Hough *v.* Railway Co., 100 U. S. 213; Wharton on Negligence, sect. 232 *a*, says, —

“In the light of these authorities the contention that the deceased and the conductor and engineer of the freight train were fellow-servants in the sense that would shield the corporation from liability for their gross negligence must be rejected. The employees of the freight train having it in charge represented the corporation at the time of the collision resulting in the death of petitioner’s husband; and their admitted negligence I hold to be the negligence of the corporation to the same extent as if it were a natural person, actually present, and superintending the train when the deceased was killed.”

Train Despatcher and Engineer are not Fellow-Servants. — A train despatcher, wielding the power and authority of a railroad company in the moving of trains, in the changing of schedules, or the making of new ones as exigencies require, is not a fellow-servant with a train employee; and for his negligence, which is the proximate cause of an injury to such employee, the company is liable in damages. Lewis *v.* Serfert, 116 Pa. St. 628.

Justice Paxton delivered the opinion of the court, and said, —

“The distinction between general despatcher, one who has the absolute control of all the trains upon the road, and the conductor or engineer of a train is manifest. The latter have the duty of obedience. Their business is to run their trains under orders from the despatcher; and if an employee is injured as the result of their negligence, the company is not liable. They are in the same common employment, and are laboring together to the same end under orders from superior authority.

“The argument for the plaintiff in error, if carried to its logical conclusion, would wholly obliterate all distinction between railroad employees from the president down, as they may all be said to be in one sense in the same common employment, and paid by the same corporation.

“While the cases are not uniform upon this subject, the weight of authority is with the foregoing views. In addition to the authorities cited, we may refer to Flike *v.* Boston & A. R. R. Co., 53 N. Y. 549; Pittsburg, etc., R. Co. *v.* Henderson, 5 Am. & Eng. R. R. Cas. 529; McKinne *v.* Cal. South. R. R. Co., 21 Am. & Eng. R. R. Cas. 539; *s. c.*, *sub. nom.* McKune *v.* California Southern R. R. Co., 17 Am. & Eng. R. R. Cas. 389; Phillips *v.* Chicago, etc., R. Co., 23 Am. & Eng. R. R. Cas. 453; Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475; and Washburn *v.* Nashville, etc., R. R. Co., 3 Head (Tenn.), 638.

“Against these authorities we have only Robertson *v.* Terre Haute, etc., R. R. Co., 8 Am. & Eng. R. R. Cas. 175; and Blessing *v.* St. Louis, etc., R. Co., 77 Mo. 410; *s. c.*, 15 Am. & Eng. R. R. Cas. 298.

“These cases, however, do not sustain the broad principle contended for them; and, if they did, we would not be disposed to adopt them in the face of so much respectable authority the other way. Aside from authority, I am of opinion that the doctrine we have announced is founded upon the better reason, and is a rule both valuable and necessary for the preservation of the lives not only of railroad employees, but of the travelling public as well.”

AYRES

v.

RICHMOND & DANVILLE R. Co.

(Virginia Supreme Court of Appeals, March 29, 1888.)

Coupling Cars with Projecting Load. — Negligence of Conductor. — Fellow-Servant. — The conductor of one of defendant's railroad trains ordered a brakeman to make a coupling to a car over the end of which lumber projected. The brakeman knew the danger, but obeyed the order, and was caught between the lumber and the next car. The conductor saw the accident, and signalled the engineer to "Jar ahead quickly," which was done, causing the brakeman to fall; and the coupling having been made, the wheels passed over him and killed him. In an action to recover for the death of the brakeman, *held*, —

1. That the plaintiff might recover upon a demurrer to the evidence; the death having been caused by the negligence of the conductor, the defendant's agent, in giving the signal without looking to see if the coupling had been made.
2. That the conductor was not a fellow-servant of the deceased.

ERROR to Circuit Court, Nelson County.

Action by Dora P. Ayers, administratrix of Ro. H. Ayers, deceased, against Richmond & Danville Railroad Company, for the negligent killing of plaintiff's intestate. Judgment was entered for defendant upon demurrer to plaintiff's evidence, and plaintiff brings writ of error.

Ro. Whitehead and Fitzpatrick & Gordon for plaintiff in error.
Charles M. Blackford for defendant in error.

LACY, J. — This is a writ of error to a judgment of the Circuit Court of Nelson County, rendered on the sixth day of April, 1887. The action was trespass on the case for damages for the killing of the plaintiff's intestate by the cars of the defendant company. There was a demurrer to the evidence by the defendant, in which the court compelled the plaintiff to join. The jury found for the plaintiff, assessed the damages at \$10,000, — \$1,000 to each of the four children of the deceased, and the remainder to go to the plaintiff, the wife of the deceased, subject to the judgment of the court upon the demurrer to the evidence. The judgment of the court was for the defendant, and the plaintiff applied for and obtained a writ of error to this court. The facts material to be stated are as follows: The deceased was a brakeman on the defendant company's road running from Danville to Alexandria, which passes through the county of Nelson. On the day of the killing of the

Facts.

deceased, the conductor of the defendant company's train of freight-cars took in, soon after leaving Danville going north, a car improperly loaded with timber projecting over the ends of the car on one side. This train was cut at Lynchburg and at Lovington — the place of the accident — at this lumber car, where the ends of the lumber projected so as to make the coupling dangerous on one side. The train was run upon the siding to clear the main track for other trains, and uncoupled to clear obstruction from the county highway. The conductor of the train at Lovington ordered the deceased, who was the middle brakeman, to couple up, and he went into the depot. The brakeman was alone, and had to give the signals to back the train together, and then couple. To do this he had to be on the side of the car where it was most dangerous from the projecting timber, so as to give the signals, as the train was curved round that way, and the engineer sat on that — the right — side. In doing this, deceased got wedged fast between the ends of the timber and the end of the car it was backed against, so that he could not extricate himself, and cried out, as did others, for help. The conductor coming out of the depot, hearing his cries and seeing his situation, crossed to the same side to give the signal to the engineer, when, without going to the brakeman wedged between the timber and the car, or waiting to see whether the coupling had been made or not, hastily signalled the engine-man to "jar ahead quick." The engine-man moved quickly forward; and, as soon as the "slack" had been taken up, the imprisoned brakeman was liberated, and dropped to the ground, or was jerked down by the car; and, the coupling having been made, the whole train moved rapidly forward, and the wheels mashed deceased's leg from his body, breaking the pubic bone and crushing the pelvis, and deceased died in about an hour, from the shock. One witness testified that he saw deceased make the coupling, "and he had his back to the piece of timber which was on the flat-car and projected over. I heard him call for some one when he got squeezed, and I ran to him, and tried to catch him. Just as I got there he fell between the cars. He fell just as the train started, and the wheel ran on his right leg."

The first question which we will consider is as to the action of the court in rendering judgment for the defendant company on the demurrer to the evidence. It is well settled that the right of the plaintiff to recover damages in this action is dependent upon the question whether the defendant company was guilty of negligence. . If the injury was occasioned solely by the negligence of the defendant company, there can be no doubt of the plaintiff's right to recover damages for the killing of her husband. But if

**Negligence of
the company
and the con-
ductor.**

there was negligence on the part of the deceased which contributed to the injury, the law will not undertake to apportion the fault. There can be no recovery for an injury caused by the mutual fault of both parties. The mere negligence of the deceased, however, would not disentitle his administratrix to recover, unless it were such that, but for that negligence, the misfortune would not have happened; nor if the defendant might, by the exercise of care on its part, have avoided the consequences of the plaintiff's negligence. *Railroad Co. v. Lee*, 5 S. East. Rep. 579, and cases cited. These principles have been long well settled, and are thoroughly understood by the profession; and this case furnishes to an uncommon degree a complete illustration of each branch of these principles. *First*, The defendant company was undeniably guilty of negligence in taking into this train this improperly loaded car; and while it is true that, when a servant enters upon an employment, he accepts the service subject to the risks incident to it, it is no less true that it is the duty of the company to exercise care to provide and maintain safe, sound, and suitable machinery, roadway, structures, and instrumentalities; and it must not expose its employees to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service; and the employee has a right to presume these duties have been performed. In this case the dangerous car should not have been taken into the train until it had been properly loaded, and divested of unnecessary and unusual danger to life and limb. And after it had been thus improperly admitted and negligently coupled in the train, it was negligence to direct this brakeman to signal and couple, when both could only be performed on the side of the greatest danger. *Secondly*, The negligence of the company being clear and undeniable, it is urged that, as this brakeman knew of the dangerous character of this car, and the special danger on the right side, he should have declined the service when specially so ordered by the company's agent to signal and couple on this side. And this may be conceded under the authority of the case of *Darracutts v. Railroad Co.*, 31 Am. & Eng. R. R. Cas. 157, and the cases cited. Yet, in the *third* place, the fact is, that this dangerous duty was performed, the train coupled, and his life was not yet forfeited by this act. But by the negligence of the company, and his co-operating negligence contributing to the accident, he was caught and squeezed tight between the timber and the car; and then his negligence and his danger became known to the defendant. And the defendant, then having become aware of the danger and the negligence of both company and employee, by the exercise of care on his part might have avoided the consequences of the deceased's negligence by un-

coupling the train which was squeezing the deceased, and signaling to the engine-man to move up. But without going to see whether the coupling had been made, which indeed was right under his eyes, and without looking, the conductor hastily, hurriedly, incautiously, negligently, signaled the engine-man to go forward quick; and he went forward so quickly and rapidly that the witness, McNalty, who had run up for the purpose, and was close to the unfortunate man, was not able to snatch him out of the way of the train, which quickly crushed him to death as he lay upon the ground. And the evidence shows that he was only slightly, if indeed at all, hurt, until he was jerked down by the impetus of the cars, which properly ought not to have moved at all until he was taken from under the wheels. As deceased came to his death solely by this negligent conduct of the company's agent, the case is clearly with the plaintiff on the demurrer to the evidence, and the Circuit Court erred in holding otherwise (*Dun v. Railroad*, 78 Va. 645; s. c., 16 Am. & Eng. R. R. Cas. 363; *Railroad v. White*, 5 S. East Rep. 573, and cases cited); for the company is clearly bound by the acts of the conductor in this case, who could not, upon well-settled principles, have been held the fellow-servant of deceased (*Moon v. Railroad*, 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531, and cases cited; *Railroad v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. R. Cas. 15).

The judgment of the Circuit Court of Nelson County will be reversed and annulled, and such judgment rendered here as the said Circuit Court ought to have rendered.

Who is Fellow-Servant with Conductor. — See *Chicago, etc., R. Co. v. Lundstrum*, and note, 21 Am. & Eng. R. R. Cas. 528-534; *Cassidy v. Maine, etc., R. Co.*, 17 Ib. 519; *Rodman v. Michigan Central R. Co.*, 17 Ib. 521; *Pease v. Chicago, etc., R. Co.*, 17 Ib. 527; *Colorado Central R. Co. v. Martin*, 17 Ib. 592; *Chicago, etc., R. Co. v. Ross*, 17 Ib. 509; *Moon v. Richmond, etc., R. Co.*, 17 Ib. 531; *Howland v. Milwaukee, etc., R. Co.*, Ib. 578; *Smith v. Potter*, 2 Ib. 140; *Ross v. Chicago, etc., R. Co.*, 2 Ib. 640; *McLeod v. Ginther*, 8 Ib. 162.

For Late Cases as to who are Fellow-Servants generally. — See *Criswell v. Pittsburg, etc., R. Co.*, *ante*, p. 232.

Injuries to Employees engaged in Coupling Cars. — See *Darracutts v. Chesapeake & O. R. Co.*, and note, 31 Am. & Eng. R. R. Cas., 157-162.

Contributory Negligence of Brakeman uncoupling Stationary Cars when he is Aware of Approaching Train. — *Chesapeake & O. R. Co. v. Lee* (Va.), 5 S. East. Rep. 579, was an action against a railroad company by an employee injured while uncoupling a car from some stationary cars, by the running of a coal train and pier-engine into such cars. There was evidence that, when plaintiff went in between such cars, he saw such engine stalled on the up grade, and that there was at that time only about twenty feet between such stationary cars and the train; that plaintiff was delayed in his work by a tight coupling-pin; that the train gave no warning by bell or whistle; that the escape of steam, as the engine climbed the grade, could be heard a long distance. *Held*,

that plaintiff's negligence was the proximate cause of his injury, and he could not recover.

The court said, "The fact that the engine had a loud exhaust, which grew louder as it climbed the grade with its burden of loaded cars, was held to be signal enough of its approach; as it could be distinctly heard for half a mile. And the evidence in this case shows that it did attract the attention of the plaintiff when within forty feet of him with the end of the train it was pushing, and the train coming up was within fifteen or twenty feet of the standing cars when the plaintiff went in among them of his own motion to uncouple one of them from the rest. It was an act of negligence for the plaintiff to go in to uncouple these cars, with an approaching heavily loaded train close at hand. A moment's delay would have saved him from the injury, and without this indiscreet act on his part the injury would not have happened. He not only ought to have known that the engine, with its immense load, was coming up to the standing cars, but he did undeniably know it; for it was just what it was and had been doing, all day long, every day since he had been in that service. If his judgment was, that he could uncouple and get out in time, when he found he had a tight pin to deal with, and had to stop to knock it up and out, he should have provided for his safety by stepping out from between the cars, or in some other way. He cannot complain of the company, because its agent did his duty as he was accustomed to, and in duty bound to do it. In this case the company, the plaintiff in error, appears to be entirely without fault in the matter; and there is no just ground upon which the finding of the jury could be sustained."

Inexperienced Brakeman killed while coupling Cars, owing to Negligence of the Conductor, can recover in Virginia. — In *Johnson v. Richmond & A. R. Co.* (Va.), 5 S. East. Rep. 707, it was held that where the evidence shows that, while the brakeman, who was a minor, and upon his first trip, was coupling freight-cars by order of the conductor, the conductor was so situated and so far away that he could not see the opening between the cars, nor the brakeman, so as to give the proper signals to slow up, and that the brakeman was killed by the cars coming together with great force, negligence is proved on the part of the conductor, for which the company is liable.

The court said, "The facts proved by the evidence demurred to in this case not only justified the jury in drawing the inference of negligence, but they offered proof conclusive of negligence and recklessness on the part of the conductor of defendant's train, who was the agent of the company; for whose negligence the company is liable for any injury incurred by an employee, without his own fault, in the discharge of his duty under the orders of the conductor of the train. See *Moon's Adm'r v. Railroad Co.*, 78 Va. 745; s. c., 17 Am. & Eng. R. R. Cas. 531; *Railroad Co. v. Ross*, decided in the Supreme Court of the United States, Dec. 8, 1884, and reported in 17 Am. & Eng. R. R. Cas. 501; and the opinion of this court, delivered this day by Lacy, J., in the case of *Ayers v. Railroad Co.*, 5 S. East. Rep. 582."

Injury to Brakeman knowingly attempting to Couple a Broken Car. — Where a brakeman knows that it is unsafe to couple a broken car in the ordinary manner, and yet persists in doing so, and is killed, his representatives cannot recover against the railroad company operating the car. *Barkdall v. Pennsylvania R. Co.* (Penn.), 11 Cent. Rep. 707.

COLE

v.

CHICAGO & NORTH-WESTERN R. CO.

(Wisconsin Supreme Court, Feb. 28, 1888.)

Liability of Company for Injury to Bridge Builder engaged in coupling Cars. — The foreman of a gang of bridge-builders, an intelligent adult, who consents to a direction to take an engine and his men, and do some switching, and makes no objection on account of his want of experience, cannot recover for an injury received while coupling cars, which he was not personally directed to do, owing to a defective coupling appliance on the engine, not shown to have been known to the company. No negligence of the employer can be predicated upon such a state of facts alone.

APPEAL from Circuit Court, Fond du Lac County; N. S. GILSON, Judge.

Action by Silas Cole against the Chicago & Northwestern Railway Company, for injuries received while in their employ. Judgment for the plaintiff for \$2,750. Defendant appeals.

Fenkins, Winkler, & Smith for appellant.

Sutherland & Sutherland for respondent.

TAYLOR, J. — This action was brought by the respondent against the appellant company, to recover damages for an injury sustained by him while in the employ of said company. The material allegations of the complaint, which were put in issue, are as follows; viz., "That the plaintiff, on the twenty-fifth day of November, 1880, at the time of the grievances hereinafter mentioned, was, and prior thereto had been, in the employment of the defendant as foreman in charge of a gang or crew of men constructing and building bridges and buildings for said defendant railway company along its lines on what was known as the 'Wisconsin Division' of said railway, and was then at work along the line of what was known as the 'Sheboygan and Western Division' of said company's lines. That on said day said plaintiff was engaged in the employment aforesaid, near Peeble station, just out of the city of Fond du Lac, Wisconsin, upon said road, and while so engaged he came into the city of Fond du Lac with the engine hereinafter mentioned, and then received a telegraph despatch or request from C. X. Smith, who was then train-master and acting as superintendent of said Sheboygan and Western Division of the defendant's road, and had due authority in the premises, which despatch

requested the plaintiff to switch certain of said company's cars, and do certain switch-work, at the depot of said Sheboygan and Western Division in said city of Fond du Lac. That the performance of such work was no part of the plaintiff's employment above set forth, and was not contemplated in or by the contract made between plaintiff and defendant pursuant to which plaintiff was employed. That, in obedience to said request of said superintendent, the plaintiff, in order to do the said switching, was compelled to couple a certain car to the said locomotive engine hereinafter mentioned. That in performance of said work the said plaintiff was unversed and inexperienced, which fact was well known to the train-master and acting superintendent and said defendant. That, while the plaintiff was so engaged, the engine or locomotive was managed by the engineer then in charge of said engine, and employed by the defendant for that work, carelessly and with great negligence, as this plaintiff has been informed and verily believes, so that, when plaintiff signalled said engineer to start said engine forward, it was, on the contrary, backed with great force against this plaintiff. That it was the duty of the defendant company to provide a good, careful, and skilful engineer, and to provide a good, safe, and secure locomotive engine, with good, safe, and secure machinery, appliances, and apparatus; but said defendant did, in fact, furnish a careless and unskilful engineer, as the defendant well knew, and did furnish a locomotive to convey the materials and perform other work for the gang of men aforesaid in building bridges, buildings, as above alleged, and in doing the said switching aforesaid, which was, as the plaintiff has been informed, and verily believes, about twenty-five years old; had become so worn, broken, and decayed as to become unfit for any service upon said road; which defective condition was then, and for a long time prior thereto had been, known by the defendant company. That said engine was a passenger engine, and had no coupling appliances fit to couple on any car except a passenger-car. That the coupling apparatus on said engine was of an old pattern, and of an unsafe and dangerous character, while on other engines then used by defendant a newer and safer appliance was in general use. That at the time of the accident hereinafter mentioned one of the long bolts which held the draw-castings on the rear of the tender of said engine, at the place of coupling, was projecting about two inches beyond the plate, either from having been broken or having been drawn out through the rotted wood; whereas it should not have projected at all beyond the face of the casting. That plaintiff, without carelessness, negligence on his part, or knowledge of said projecting bolt, attempted to make the said coupling between the

said tender and a caboose car, in accordance with the said request of said acting superintendent; and when said engine and tender came back upon him, as above alleged, he endeavored to withdraw his hand, but by reason of the said defects the same was caught and held fast by the said projecting end of said bolt; his right wrist was pierced by said bolt, and was seriously lacerated, bruised, and injured, so that the same has consequently become and is permanently stiffened and disabled; and at the same time the plaintiff's right hand was wounded and bruised, and the second finger of said hand was so crushed and cut that it had to be at once amputated." Upon the trial in the Circuit Court, the respondent had a verdict for \$2,750 damages; upon which verdict judgment was entered in his favor. From said judgment the railway company appeals to this court. On the trial the jury rendered a special verdict as follows: "(1) Was the injury to the plaintiff caused by catching his glove on the rod from which the jam-nut was gone, which thereby prevented him from withdrawing his hand in time to have escaped injury? *Answer.* Yes. (2) Would the plaintiff have withdrawn his hand in time to have avoided the accident if his glove had not caught on the rod? *A.* Yes. (3) Had there been any change in the original position or condition of the rod, except that the jam-nut was off? If you answer yes, then state what the change was. *A.* No. (4) Did the jam-nut come off from the rod at the time of switching out the coal-cars on the day the plaintiff was injured? *A.* We believe not. (5) How long had the nut been off from the rod in question? *A.* We do not know; no evidence to show. (6) Had the nut been off from the rod for such a length of time before the accident that the defendant, in the exercise of ordinary care in the inspection of engines and appliances, could have discovered it, and put on a new nut? *A.* We do not know; no evidence to show. (7) Did the plaintiff see or know the condition of the rod at the time he attempted to make the coupling? *A.* No. (8) Could the plaintiff, by the exercise of ordinary care, have seen the rod, and avoided catching his glove in it? *A.* No. (9) Did the plaintiff use and exercise ordinary care in attempting to couple the engine and car at the time he was injured? *A.* Yes. (10) Did the rod, in the condition it was, materially increase the danger of making the coupling? *A.* Yes. (11) Did the plaintiff, immediately before he went between the car and tender to make the coupling at the time his hand was caught and injured, signal the fireman to back up? *A.* No. (12) Did the plaintiff, immediately before he went between the tender and car, signal the fireman to start up, and did the engine start up, and then without further signal back up, and injure the plaintiff's hand? *A.* Yes. (13) Did the engine back up without any signals

from the plaintiff, either to go ahead or back up? *A.* Yes. (14) Was the engine backed up against the car with ordinary care and prudence by those servants of the defendant in charge of it? *A.* No. (15) Was it necessary, in order to shove the car back to the place where it was desired to be left, that the coupling should be made? *A.* No. (16) Did the plaintiff have sufficient knowledge, experience, and intelligence to comprehend and understand the dangers incident to the employment of coupling engines with a Miller engine-coupler to cars? *A.* No. (17) If the court shall be of the opinion that the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* Two thousand seven hundred and fifty dollars (\$2,750)."

At the close of the evidence, the defendant moved the court to direct a verdict in its favor, which motion was denied, and exception duly taken; and on the rendition of the verdict the defendant moved for judgment upon the special verdict, which was also denied, and exception taken. Various other exceptions were taken by the defendant upon the trial, which need not here be stated or considered. Upon the argument of the appeal in this court, it was not deemed by the learned counsel for the respondent that there was sufficient evidence in the case to sustain a verdict in favor of the respondent on the ground that the defendant was guilty of negligence in furnishing him unsuitable or unsafe machinery for doing his work, or that the company was guilty of negligence in employing a careless or incompetent engineer for managing the engine which was used in the performance of the work in which he was engaged when the injury was sustained by him. As to the competency of the engineer in charge of the locomotive, no evidence was given, or, if given, no claim was made, that he was incompetent. As to the dangerous and unsafe condition of the engine and tender used in doing the switching of the cars to be switched, some evidence was given; but it is not claimed by the learned counsel for the respondent, that, on the findings of the jury upon that question, the plaintiff would be entitled to recover upon that ground alone. By an examination of the answers of the first eight questions submitted to the jury as a part of the special verdict, it is very clear that the defect in the tender which, it is claimed, is the proximate cause of the injury, was not shown to have been known to the defendant, nor that it was of such long standing that, in the exercise of ordinary care in that respect, the company ought to have known of such defect. The only ground for sustaining the verdict in favor of the plaintiff relied upon by the learned counsel for the respondent is, that, at the time the plaintiff was directed to do this switching by the company, he was not employed by the company

The grounds
relied on to
sustain verdict.

to do such work ; that the work of switching in the yard of the defendant was dangerous work, and that the plaintiff was not accustomed to do such work, nor was he acquainted with the dangers incident thereto ; and that in such case the defendant is liable for the injury if the injury was caused by the negligence of the engineer in charge of the engine, or by a defect in the machinery, whether such defect was known to the defendant company or not. If this rule be as claimed by the learned counsel for the respondent, the findings of the special verdict are perhaps sufficient to sustain the verdict when aided by the undisputed evidence in the case. By an examination of the findings from the ninth to the sixteenth, inclusive, it will be seen that there is no finding that the defendant company directed the plaintiff to do this work of switching, nor that such work was not such as the plaintiff had been employed to do. These two points are probably supplied by evidence which is not controverted by the

What must be shown to entitle plaintiff to recover.

defendant, and so the verdict may be aided to that extent. If it be necessary, in order to entitle the plaintiff to recover in this action, to show affirmatively that switching cars in the yard of the company is more dangerous employment than the employment which the plaintiff had contracted with the defendant to perform, then the verdict would be insufficient for want of any such finding, or if it be necessary for him to show that the company knew that such employment was more dangerous than the ordinary employment of the plaintiff, then the special verdict would be imperfect in that respect also. The findings upon this part of the case simply show that the plaintiff used ordinary care on his part, and that the injury was either the result of the negligence of the engineer or the defect in the tender, and that the plaintiff had not sufficient experience and intelligence to understand and comprehend the danger incident to the employment of coupling engines with a Miller engine-coupler to cars.

The theory of the learned counsel for the plaintiff is, that where the master directs his employee temporarily to perform work not contemplated by his contract of employment, and such work is of a dangerous character,—whether more dangerous than his general employment or not is immaterial,—the master becomes liable to protect him while so employed against the carelessness of his employees, and also against any injury he may receive on account of defective machinery, whether the company have any previous knowledge of the defect or not. He claims that the basis of recovery in such case lies in the fact that the master directs the employee to perform a work outside of his usual employment, which is in its nature a dangerous employment ; and that the mere direction of the

Plaintiff's contentions.

master to perform such temporary and dangerous work is negligence on the part of the master sufficient to sustain the action of the employee so injured in the performance of such work while he is using ordinary care on his part. Stating it in a little different form, the learned counsel says that the ordinary rule, that the employee assumes the dangers incident to his employment, is not to be applied to the case where the employee, at the direction of the master, does work, temporarily, outside of his contract of employment. In order to sustain the judgment in favor of the plaintiff in this case, we think it will be necessary to adopt the rule as stated by the learned counsel to its full extent, because the questions as to whether the temporary employment was more or less dangerous than the ordinary employment of the plaintiff, or whether the defendant was guilty of negligence in directing the plaintiff to do the work in the doing of which he was injured, was not submitted to the jury. The negligence of the defendant, upon which the action must be sustained, if sustained at all, consists in his directing the plaintiff to do the work ; and under that rule the question as to the knowledge of the employee of the dangers incident to the work to be done, or his want of knowledge, would be wholly immaterial.

We are very clear that the broad rule contended for by the learned counsel for the respondent is not sustained by the authorities, nor by the general rules of law which define the relations of the employer and employee. Some of the cases cited by the learned counsel for the respondent may have some general statements in the opinions which give some countenance to the rule as stated by counsel ; but when the facts of each case are considered, it will, we think, be found that no such broad rule was ever intended to be sanctioned by any of the courts. Whether the employer is guilty of negligence such as will entitle his employee to recover for an injury sustained while doing a temporary work outside of his contract of employment, when such injury is the result of the negligence of a co-employee, or of a defect of machinery not known to the employer, or other cause, is in every case a question of fact, to be determined by all the circumstances of the case, and cannot be predicated simply on the fact that he directed his employee to do the work. In order to make the employer responsible for an injury to his employee while in his employ, the evidence must in every case show that the employer has neglected some duty which he owes to the employee ; and no case can, we think, be found where it has been held that the mere fact that the employer requested his employee to perform a temporary work, outside of his ordinary employment, was a violation of any duty which he

Same not
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rule.

owes to his employee. Whether it be a violation of such duty depends always upon the surrounding circumstances. If the particular work ordered to be done is of a dangerous character, and one which requires peculiar skill in its performance, and the person directed to perform such work has not the requisite knowledge or skill for doing the work with safety, and such want of skill or knowledge is known, or might be reasonably supposed to be known, to the employer, in that case the direction of the employer to do the work might be justly held to be a violation of a duty which he owes to his employee, even though the employee undertook to do the work without objection or protest upon his part. None of the cases go farther than this, and we can see no reason for holding a stricter rule.

**Risk assumed
by servant out-
side scope of his
employment.**

Counsel says it is well settled that "the employee assumes all the ordinary risks within the scope of his employment." To this proposition no exception can be taken, and there is no need of the citation of authorities to sustain it. It is urged that the converse of this proposition is also true, viz., that "the servant, when he enters upon the discharge of his duties, does not assume any risks outside of the scope of his employment;" and it is also insisted, that when the servant undertakes, at the order of his master, to do work outside of his ordinary employment, there is no presumption that he assumes any of the risks attending such employment. To sustain this proposition the learned counsel for the respondent cites the following cases: *Railroad Co. v. Hammersly*, 28 Ind. 374; *Lalor v. Railroad Co.*, 52 Ill. 401; *Railway Co. v. Adams*, 105 Ind. 151; s. c., 23 Am. & Eng. R. R. Cas. 408; *Jones v. Railway Co.*, 49 Mich. 573; s. c., 8 Am. & Eng. R. R. Cas. 221; *Mann v. Print Works*, 11 R. I. 152; *Railway Co. v. Bayfield*, 47 Mich. 205; *Broderick v. Depot*, 56 Mich. 261; *Cook v. Railway Co.*, 34 Minn. 45; *Dowling v. Allen*, 74 Mo. 13; *Railroad Co. v. Fort*, 17 Wall. 553; *Benzing v. Steinway*, 101 N. Y. 547; *O'Connor v. Adams*, 120 Mass. 427.

**The authorities
reviewed.**

In the case in 28 Ind. 374, the court reversed the trial court, on the ground that the employee, a minor, assumed the risk of his employment. In *Railway Co. v. Adams* the court state the rule as follows: "In all cases the master is bound to disclose to the servant latent defects and dangers of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable attention, care, and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care. This is particularly so when the master employs for hazardous and dangerous work a child, young person, or other person without experience and of immature judgment." "In the cases last above

mentioned the *gravamen* of the action is the negligence of the master in failing to give the proper warning, and in employing a person of such immature years and judgment that such warning and instructions would furnish no protection. And hence, in order that the master may be properly charged as being thus negligent, and made liable for resulting injury, it must be made to appear that he knew, or by the exercise of reasonable care and observation might have known, of the inexperience, disqualification, and immature judgment of the servant employed. When a person of apparently sufficient age, physical ability, and mental calibre to perform the service, seeks an employment at the hands of a railway company or other master, he ought to be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. In such case we know of no good reason or rule of law that will compel the master to pass him through a critical examination to discover his competency for the place, or that will convict the master of negligence for not doing so." The court further say, "When, by the orders of the master, the servant is carried beyond his employment, he is carried away from his implied understanding to assume the risks incident to the employment. Hence it is that when a servant is thus, by the orders of the master, put at work outside of his employment, and is injured by reason of defective machinery, railroad track, etc., without his fault, the master is liable, regardless of the care he may have exercised to keep the machinery, railroad track, etc., in a safe condition. When a servant is thus ordered at work at a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that they are in a safe condition, and fit for the business for which they are used. This principle or rule of law has been more frequently and more rigorously applied in cases of employees immature in years, judgment, and experience." "Here, again, it should be observed that the master will not be liable if the circumstances are such as to show that the servant is competent to apprehend the danger, and expressly or impliedly assumes the risk." We have cited at considerable length from this case, as it goes as far to uphold the rule as claimed by the learned counsel for the respondent, if not farther, than any of the other cases cited by him on the argument. And in this case the last paragraph qualifies all that is said before, and destroys the rule as contended for by the learned counsel. It leaves it, as stated above, a question of fact in all cases,

whether the master is guilty of negligence in directing the servant to do the act outside of his employment. In *Lalor v. Railroad Co.* it was found that the person representing the master knew that the employee whom he directed to couple the cars was unversed and inexperienced in that business. The decision is clearly placed on the ground that the master was guilty of negligence in directing a servant to do an extra-hazardous work whom he knew to be unskilled and inexperienced in the business. In *Jones v. Railway Co.* the person who was injured while employed in the discharge of work not within the contract of his employment, showed that he protested against doing the work. In *Railway Co. v. Bayfield* the instruction at the trial, which was upheld as good law, was as follows: "If you find that the deceased, at the time he was employed by the defendant, was a lad of seventeen or eighteen years of age, inexperienced in handling the brakes on a train of cars, such as that in question, and that he was unfitted for that work by reason of his unskillfulness, inexperience, and youth, and this was known to Smith, . . . and was ordered by Smith, the foreman and conductor of the construction train in question, acting for and as the agent of said defendant, then if he was killed while endeavoring to perform such work, without negligence on his part, the plaintiff was entitled to recover." In *Broderick v. Depot* it was held that the plaintiff was entitled to recover for a defect in the construction of a ventilator which the employee was directed to open when he received his injury, and no question appears to have been made upon the point that he was doing work outside of his ordinary employment. In *Cook v. Railway Co.* the negligence for which the defendant was held responsible was in not providing a suitable place for the plaintiff to do his work. The plaintiff in this case was also a minor. In *Dowling v. Allen* the person injured was a boy seventeen years old, — was working in a dangerous place, and had requested the person directing his work to relieve him from the work, and get some other person to perform it. The defendant was held liable, on the ground that he had not performed his duty in sufficiently instructing the servant of the danger incident to the performance of his work. All that was decided in *Mann v. Print Works* was, that if the servant "was suddenly called upon to perform a dangerous service, not strictly within the line of his duty, and requiring particular skill, there would be no presumption that he knew the risks of it; and, if so, he should not have been directed to do it without information of the nature of the service." In *Benzing v. Steinway* the recovery was sustained, on the ground that the defendant did not furnish a safe place for the performance of the work which the servant was directed to do, and not upon the ground that the service

was outside of his usual employment. The rule laid down in *O'Connor v. Adams and Railroad Co. v. Fort* is stated as follows: "If the defendant knew the peril to which the servant would be exposed, and did not give him sufficient and reasonable notice of it, and he, without negligence on his part, through inexperience or reliance on the directions given him, failed to perceive or understand the risk, and was injured, the defendant would be responsible." This rule was laid down in cases where the servant was an inexperienced minor. We think that it may be safely said that none of the cases cited by the learned counsel for the respondent hold that merely directing a servant to perform a duty outside of his usual employment is such negligence on the part of the employer as will render him liable for any injury the servant may receive while engaged in such employment; but, on the other hand, the true test of the case is whether all the circumstances attending the case, such as the dangerous character of the work directed to be done, the age and experience or inexperience of the servant, and the knowledge of the master as to these attendant circumstances, must be taken into consideration in determining the question of negligence.

In the case at bar the plaintiff was a man of forty years and upwards, an intelligent mechanic. He had been in the employ of the railroad company for over ten years, and for several years had been the foreman of a gang of men employed in building and repairing bridges and other structures for the defendant on its road, and was so engaged at the time the accident happened. In his employment he had an engine and cars under his control, for the purpose of doing his work, and a man or men whose duty it was to couple and uncouple cars as needed in such work. At the time he was requested to do the switching in the defendant's yard, he was requested to take the engine he had in use for doing his ordinary work, and the gang of men under him, and do such work. He made no objection to doing the work on the ground that it was dangerous, or that he had not sufficient knowledge or experience to do the same safely to himself and the men under his charge. Under these circumstances, it seems to us that no negligence can be attributed to the company for directing him to do the work. He undertook the work voluntarily, knowing the general danger of the employment, and the rule applicable to work done in his ordinary employment must be applied to the work done by him under such order. If the finding of the jury, that the plaintiff did not comprehend the dangers incident to the work, was supported by the evidence, it cannot alter the case. That fact was not made known to the defendant at the time; and there is nothing in the evidence

The facts reviewed, and plaintiff held not entitled to recover.

which would tend to show the defendant that the plaintiff had not sufficient knowledge, experience, and skill to perform the work safely to himself and those in his employ. That the plaintiff cannot recover upon the facts proved in this case is well settled by the authorities cited by the learned counsel for the appellant. *McGinnis v. Bridge Co.* (Mich.), 8 Amer. & Eng. R. R. Cas. 135; *Wormell v. Railroad Co.* (Me.), 31 Am. & Eng. R. R. Cas. 272; *Rummell v. Dilworth*, 111 Pa. St. 343-345; *Leary v. Railroad Co.*, 139 Mass. 587; s. c., 23 Am. & Eng. R. R. Cas. 383; *Railroad Co. v. Fort*, 17 Wall. 554-558; *Cahill v. Hilton*, 106 N. Y. 512-518; 3 Wood, Ry. Law, 1487; Wood, Mast. & Serv. sect. 344; *May v. Railway Co.*, 10 Ont. 70.

We are not called upon in this case to determine what the rule would be if the employee, when ordered to do work which his general employment did not require him to do, and which was dangerous in its character, objected to doing the work, on the ground of want of experience and knowledge sufficient to enable him to perform the work with safety to himself and those under him, and, notwithstanding such declaration on his part, his employer insisted upon his doing it, and thereupon he undertook to do the work after such protest rather than subject himself to the risk of being discharged from his employment. We do not in this case either affirm or disaffirm the rule stated by the Supreme Court of Massachusetts in *Leary v. Railroad Co.*, *supra*, upon that state of the case. All we decide in this case is, that when an employee of mature years, of ordinary intelligence and experience, is directed to do a temporary work outside of the business he has engaged to do, and consents to do such work, without objection on account of his want of knowledge, skill, or experience in doing such work, no negligence of the employer can be predicated upon that state of facts alone. There are other reasons why the plaintiff ought not to recover in this action. He was not directed to couple or uncouple cars. He was the foreman of a gang of men, having in charge an engine, and some one to do the coupling and uncoupling of cars. He was directed to take the engine and his men, and do the switching of some loaded cars in the defendant's yard. The order did not direct him personally to do the coupling of the cars.

Again: according to the testimony of the plaintiff himself, he was not injured on account of his inexperience in coupling cars, but by reason of a defect in the car he attempted to couple to the engine. He claims, and we are inclined to think his claim is well founded, that he would not have been injured had it not been for the projecting bolt or rod which caught his glove when

The rule if the employee had objected. What this case decides.

Plaintiff was not personally directed to couple cars.

he attempted to withdraw his hand from the place of danger. In no view of the case can the verdict be sustained, except upon the theory advanced by the learned counsel for the respondent, as stated above. We think the rule of liability as claimed by the learned counsel is not sustained, either by authority, or upon the principles of law applicable to employer and employee. Upon the undisputed evidence in the case, and upon the findings of the jury, judgment should have been rendered in favor of the appellant.

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to render judgment for the defendant.

Injuries to Employees engaged in coupling Cars. — See *Ayres v. Richmond & D. R. Co.*, and note, *ante*, p. 269.

Perilous Duties outside Scope of Servants' Employment. — See generally *Wormell v. Maine Cent. R. Co.*, and note, 31 Am. & Eng. R. R. Cas. 272, 280.

The law, as left by the principal case, and perhaps by the weight of authority, would seem to be, that if a servant, of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes the same, knowing their dangers, although unwillingly, and from fear of losing his employment, and is injured by his reason of his ignorance and inexperience, he cannot maintain an action against the master for such injury. See *Wormley v. Railway Co.*, Me. 31 Am. & Eng. R. R. Cas. 272; *Kapper v. Railway Co.*, Ind. 1 Western Rep. 287; *Cummings v. Collins*, 61 Mo. 520; *Hewlitt v. Railway Co.*, 67 Mo. 239; *Brown v. Byrose*, 47 Ind. 435; *McGlynn v. Brodie*, 31 Cal. 376; *Hoff v. Railway Co.* (Pa.), 11 Atlantic Rep. 459; *Russell v. Tillotson*, 140 Mass. 201; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Railroad Company v. Fort*, 17 Wall. 554; *Railroad Company v. Bayfield*, 37 Mich. 205; *Dowling v. Allen*, 74 Mo. 13; *Buzzell v. Manufacturing Co.*, 48 Me. 113; *Cahill v. Hilton*, 106 N. Y. 512; *Keene v. Rolling Mills Co.* (Mich.) 33 N. W. Rep. 395; *Thompson v. Railway Co.*, 14 Fed. Rep. 564; *May v. Railway Co.*, 10 Ont. Rep. Q. B. Div. 70.

The point is well put by the Supreme Court of the United States in *Railroad Company v. Fort*, 17 Wall., at page 558, where the court say, "If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or at any rate, if he chose to obey that, he took upon himself the risks incident to the service."

There are many authorities, however, which refuse to go as far as this. In *Lalor v. Chicago B. & Q. R. Co.*, 52 Ill. 401, it appears that the deceased had been employed by the defendant as a common laborer about a depot and freight house, and while so employed was ordered by the superintendent of the company to couple a freight car to a locomotive. The deceased was inexperienced in this kind of work, and while attempting to do it was killed.

The court in commenting on the facts of the case says, "They show a case of a person injured while engaged in a sphere of employment, and under the command of his superior, different from the one in which he had engaged to serve. In entering upon his engagement, the deceased may be presumed to have known the perils usually and necessarily incident to such service, and made his contract accordingly." . . . "He was compelled to do other work extra hazardous by which he lost his life." . . . "Admitting that the deceased

was in the same general service as the superintendent, his sphere was a special one, and so subordinate as to compel him to yield implicit obedience to the command of the superintendent. The company was constructively present, by and through this officer, and must be charged accordingly.

"It was, then, by the direct command of the company the deceased was exposed to this peril, and out of the line of the business he had contracted to perform. He was killed by the negligence of the driver in charge of the locomotive, while thus exposed. The law would be lamentably deficient did it furnish no remedy in such a case." . . . "We place this case on the ground of misconduct of the company in exposing the deceased to this peril, and when so exposed, in so carelessly mismanaging the engine as to cause his death. It is needless, in this view, to consider or comment upon the numerous cases cited. None of them meet this case."

In *Pittsburg, etc., R. Co. v. Adams*, 105 Ind. 151, s. c., 23 Am. & Eng. R.R. Cas. 408, the plaintiff was employed as a section hand, but was ordered out on a construction train, and on the train was directed to act as brakeman, and while acting in this capacity he attempted to couple some cars, and in doing it was injured. It was contended that the defendant was not liable, because not chargeable with notice or knowledge of the defect, which caused the injury; and while the court considered the general rule to be, that it must be shown that the defendant had knowledge of the defect, or that the circumstances were such that it ought to have known of the defect, the court, however, says that this rule is not without exceptions, and one exception obtains when the servant is taken out from the class of work he is employed to do, and put into more hazardous work. In considering the effect of taking the servant from his regular employment, and putting him at more dangerous work, the court says, —

"If the servant, by the orders of the master, is carried beyond the contract of hiring, he is carried away from his implied undertaking as to risks. If the master orders him to work temporarily in another department of the general business, where the work is of such a different nature that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not by obeying such orders necessarily thereby assume the risks incident to the work and the risks of negligence on the part of such employees. He will not necessarily be guilty of negligence in obeying such orders of the master, even though they may carry him into more hazardous and dangerous work. . . .

"As we have said, when by the order of the master the servant is carried beyond his employment, he is carried away from his implied undertaking to assume the risks incident to the employment. Hence it is, that when a servant is thus, by the orders of the master, put at work outside his employment, and is injured by reason of defective machinery, railroad track, etc., without his fault, the master is liable, regardless of the care he may have exercised, to keep the machinery, railroad track, etc., in a safe condition. When a servant is thus ordered to work at a particular place, or with particular machinery, etc., outside of his employment, the master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that they are in a safe condition, and fit for the business for which they are used."

In *Jones v. Lake Shore, etc., R. Co.*, 49 Mich. 573, it appeared that the plaintiff entered the employ of the defendant in June, 1880, as brakeman, and was exclusively employed as such upon passenger-trains until the early part of February, 1881. At this time, by the order of the division superintendent, the plaintiff occasionally did certain switch work, and on the 12th of April following, while attempting to couple some freight-cars, he was injured.

The court says that "the theory of the plaintiff's case was, that he had been employed as a brakeman upon a passenger train, and within the scope of such

employment he could not be called upon or rightfully be required to perform services of a different character or more dangerous."

The court said, "The material and important question raised is, whether the company did not have the right to direct the plaintiff to do the switching at Monroe, and also whether he did not, by complying with this order, voluntarily enter upon the discharge of such duties, and assume the risks ordinarily connected therewith."

It also appeared that the plaintiff had signed a written contract requiring him to take certain precautions in the performance of his duty, etc. But the court held that the plaintiff, at the time he was injured, by the direction of his superior officer was engaged in service which he never agreed to perform, and therefore the company was liable for the injury.

In *Mann v. Oriental Print Works*, 11 Rhode Island, 152, the plaintiff was employed as a fireman to tend the engine in the defendant's mill. The engineer called upon the plaintiff on a certain occasion to assist in throwing on a belt which was used to operate a pump which filled the boiler. In attempting to do this, the fireman was injured, although he had several times before done the same thing.

On the trial, the court below, in charging the jury, said that "if this fireman was suddenly called on to perform a dangerous service not strictly within the line of his duty, and requiring peculiar skill, there would be no presumption that he knew the risks of it; and, if so, he should not have been directed to do it without information of the nature of the service and risk."

The court held that the charge was correct, and said, —

"In the present case the jury were told substantially, and we think rightly, that if the fireman, although employed only for a fireman, was placed under the orders of the engineer, and was by him suddenly called upon to assist in throwing on a belt, out of his own sphere, but within the sphere of duty of the engineer, and was thus subjected to a risk with which he was not acquainted, or to a particular and greater risk at that time, and of which he was not informed or cautioned, then the defendants would be liable; and we think the jury were rightly told, that, if the fireman was placed under the engineer as his superior, and his superior had a right to give orders in his department, the case did not come within the principle regulating liability in cases of fellow-servants, and that the engineer must be looked upon as representing the employer."

In *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, — opinion by Chief Justice Cooley, — it appeared that the deceased had been employed by the defendant, and set to work as a common laborer in connection with a construction-train. On the occasion of the accident the deceased was ordered by the person in charge of the construction-train to act as brakeman; and in proceeding to obey the order, he met with a fatal injury.

The right to recover was put upon the ground that the defendant railroad company, acting through the person in charge of the construction train, had wrongfully sent the deceased into a dangerous place, and exposed him to a risk not connected with his service, and therefore the defendant was liable for the resulting injury.

The defendant contended that, the deceased having consented to obey the order of the person in charge of the construction-train, it was the deceased's voluntarily act, and he assumed the risks incident to the undertaking. The court held that the fact that the deceased was under no obligations to obey the order of the foreman of the construction-train, was no defence. "When one person engages in the employment of another, he undertakes to obey all lawful orders; and he subjects himself, for any failure to do so, to the double liability of being expelled from the employment, and of being required to pay damages. . . . It is not for the master to insist that the servant was in the wrong in not refusing obedience. Respect for the master as well as a consid-

eration for his own interest may very properly induce him to waive his own judgment for that of his superior, and instead of engaging in disputes, and being perhaps ejected from his employment, to leave questions of doubt for future settlement. . . . It is perfectly just under such circumstances to leave upon the master the responsibility he assumes in giving an unwarranted order, and to hold that the servant is not blamable in yielding obedience to his superior. It may still be said, that, in thus yielding obedience, he accepts the risks which accompany it for the same reasons that he accepts the risks of the employment in which he is actually engaged. But the risks the servant actually assumes are only those which are properly incident to the employment. . . . It is only where risks properly pertain to the business, and are incident to it, that the master is excused from responsibility."

In *Broderick v. Detroit Union Depot Co.*, 56 Mich. 261, it appears that the plaintiff was a common laborer employed loading and unloading cars, under the charge of the foreman. Subsequently, in pursuance of orders from the foreman, and under the immediate direction of the fireman in the boiler-room, he attempted to close a damper in the ventilator, about twenty feet above the boilers, and was injured in so doing.

The court says, "The case was submitted to the jury mainly upon the proposition that the defendant had negligently put the plaintiff to perform work outside of the scope of his employment, the dangers of which he knew nothing, by reason whereof he was injured." There was no proof of defendant's knowledge of any defect, yet the court held that the plaintiff was entitled to judgment.

In *Cook v. St. Paul M. & M. R. Co.*, 34 Minn. 45, the plaintiff was employed in one branch of work, but was directed by his immediate superiors to do certain other and more hazardous work in another place. The court said that the plaintiff had a right to presume that the master had done his duty in respect to examination of the machinery to be used by the servant, and making it safe for the purpose intended, and therefore the servant, "when directed by proper authority to perform certain services or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with contributory negligence, or with the assuming of the risks of so doing. . . . The work that the plaintiff was engaged in when he was injured was wholly outside of that for which he entered defendant's service, and also outside of the line of defendant's usual business." His immediate superiors having ordered him into this place of danger, and standing in the shoes of the principal, thereby made the defendant liable for the resulting injury.

In *Dowling v. Allen*, 74 Mo. 13, it appears that the plaintiff was hired by the defendant, who was engaged in the foundry business. At first the plaintiff was employed in running errands and sweeping out. After that he was put at work in the machine-shop, and in the yard, where a turn-table was being constructed. The foreman of the defendant had told the plaintiff to obey the orders of one King. After plaintiff had been working about three weeks at the turn-table with King, King directed him to stop the engine, which the plaintiff might have done by proceeding in either one of two ways. The way he took brought him in contact with a revolving shaft, and he was injured. The plaintiff's complaint proceeded upon the theory that it was no part of his duty as an employee of the defendant, under his contract of employment, to stop the engine, and that with his lack of experience it was gross carelessness to require him to stop the engine. Judgment for the plaintiff was affirmed.

In *O'Connor v. Adams*, 120 Mass. 427, the plaintiff was an ordinary laborer, and secured employment by the defendant. He was set at work in a warehouse where there was no machinery, but after several weeks he was put to work upon a dangerous machine which was revolving with great rapidity.

The danger was obvious and apparent, and the plaintiff had ample opportunity to see and know how the machine was operated, and he could have done the work directed without putting himself in danger; yet the court held the defendant liable for the plaintiff's injury, because the defendant's agent "put the plaintiff in a place of peculiar danger, of which he had no knowledge or experience, without informing him of the risks or instructing him how to avoid them."

In *East Line & R. R. Co. v. Scott*, 68 Tex. 694, it was held that if an employee is subject to the orders of a superior, by whom he is directed to perform acts not within the line of his ordinary duties, and it is customary in the employer's service for employees to obey orders to do duty outside of their regular employment, such employee is not precluded from recovering for injuries received while so acting under his superior's orders.

GULF, WESTERN, TEXAS, & PACIFIC R. Co.

v.

RYAN.

(Texas Supreme Court, Jan. 31, 1888.)

Injury to Servant while disobeying Rules. — If an employee knowingly and intentionally disobeys a reasonable rule or regulation established for his safety, unless he does so under the influence of fear produced by the appearance of sudden danger, and the act of disobedience is the proximate cause of the injury complained of, he cannot recover.

COMMISSIONERS' decision. Appeal from District Court, Calhoun County; H. C. Pleasants, Judge.

John J. Ryan brought this suit to recover of appellant damages for personal injuries resulting in the amputation of his right leg below the knee. He alleged in his petition that he was road-master of defendant company, but had no connection with the running of its trains, nor was it any part of his duty or employment to see that the cars used on the road were in good order. That on or about the twenty-sixth day of December, 1879, he was directed by the president of said corporation to go up said railway from the city of Indianola to hasten the completion of certain works on said railway, and that, in pursuance of said order, on the twenty-sixth day of December, 1879, he entered upon the cars of said corporation to go up said road for the purpose aforesaid, and also to inspect the different parts of said road. That when they arrived at a place known as the "Tank," about twelve miles above

Indianola, the train was stopped to take water, and, while so stopped, plaintiff alighted for the purpose of inspecting certain works, — the conductor and engineer being aware of such fact, — and while he was inspecting the works the train was put in motion, without any signal or other warning to petitioner, who, in the course of his employment, was compelled to go farther up said railway; whereupon said train running slowly, at a speed which did not render it dangerous, if the cars had been properly constructed, to board said cars, plaintiff tried to get upon the passenger-car upon said road, and in attempting to do so his foot slipped, and while he held on to the railing at the steps one of the trucks ran over his foot and crushed it, and amputation became necessary. That the cause of his injury was, that the car of said corporation which plaintiff tried to board was so defective and dangerous in its construction that no one could with safety enter the same; which was known to defendant, and unknown to plaintiff when he tried to enter said cars. It was dangerous and defective in its construction, in this: that the steps to said cars were higher than steps are when properly constructed; that said steps did not extend to the outside of the car, but were placed with the outer or lower step of said car a considerable distance within a line formed by the outer side of said car, and a very short distance from and in advance of the trucks; and it was so defectively constructed that its use was negligence on the part of the defendant company.

Defendant answered by general demurrer, and pleaded the general issue, and specially that, if there were any defects in the car, they were patent and known, or might have been known, to Ryan; that the company furnished Ryan a hand-car, and men to propel it, and that he had no orders to use the train, and did so at his option; that the car on which the injury occurred was safe; that there was no negligence or want of care on the part of the conductor or engine-driver, but, if there was such negligence on their parts, they had been carefully selected by the company, and were fellow-servants with Ryan; that Ryan's own negligence in mounting the train while in motion, contrary to the rules of the company, of which he had notice, and his attempt to so mount when he was intoxicated, and at the front end instead of the rear end of the hindermost car, were the real causes of his injury. The charge of the court limited Ryan's right of recovery to the character and condition of the car; instructed the jury that he was fellow-servant with the conductor and engine-driver, and could not recover if the injury resulted from their negligence. There was verdict and judgment for Ryan for \$7,400, and, motion for new trial being overruled, defendant appealed. Appellant insists upon the following assignments of

error: *First*, The court erred in overruling defendant's demurrer to plaintiff's petition. *Second*, The court erred in overruling defendant's motion for new trial, for the following reasons: (1) The verdict was rendered by the jury in disregard of the law of the case, as given them by the court in its instructions. (2) The verdict is contrary to the evidence. (3) The verdict is not supported by the evidence. (4) The verdict is contrary to the law and the evidence, in this: the plaintiff's claim for damages is based upon two charges of negligence on the part of defendant corporation, — one being negligence of engine-driver and conductor; upon which the court instructed the jury, that if such negligence of said conductor and engine-driver, or either of them, was proven, yet the defendant was not liable, said conductor and engine-driver being fellow-servants with plaintiff. So, if the verdict is founded upon any such neglect, it is against law. The other ground for damages alleged by plaintiff was defect in the construction of the car on which plaintiff attempted to mount. On this the court instructed the jury as to the requirements in such cars as to latent and patent defects, and as to the duty of the plaintiff to use diligence as to defects. And so, if the verdict was based on supposed defects in the car, it is contrary to the law and the evidence, and is not supported by the evidence; the evidence showing that, if there were defects in the car, they were open to the view, and in no sense latent. *Third*, If any neglect was shown by the evidence on the part of defendant corporation, the evidence also showed that plaintiff attempted to mount the train while in motion, against the rules of the corporation, of which he confessed to have had notice; and such attempt was such negligence on the part of plaintiff as relieved defendant of liability in this case. *Fourth*, The plaintiff, entering into the employment of defendant, was bound by law to take notice of such tools, instruments, and machinery as his special service required him to use, and to know all patent defects therein; and so, if he did know, or by reasonable diligence might have known, the defect in the cars he attempted to mount, the company is not liable; and as the pretended defect in the cars was open and visible to the eye, and was patent, the verdict is contrary to the law and the evidence. *Fifth*, The plaintiff, according to all the evidence, might have mounted the rearmost end of the car in safety, whereas he attempted to mount the car at the forward end, and so was injured by his own voluntary neglect. *Sixth*, The evidence showed that the car was a safe car, according to the instructions of the court, and according to law. *Seventh*, The evidence showed that the proximate cause of plaintiff's injury was his own act in attempting to mount the car while in motion, contrary to orders, and without necessity or any

form of compulsion. *Eighth*, The evidence showed that the plaintiff, at the time he attempted to mount the car, was intoxicated while on duty as an employee of defendant company. Such intoxication was culpable negligence on his part.

Appellee, in his brief, states that he does not "seek recovery upon the ground that the conductor or engineer were guilty of negligence, but only upon the ground of the defective construction of the coach." Upon the questions of the sufficiency of the car or coach and patent defects, the court gave the following instructions: "(2) The owners of railroads are by law required to furnish for the transportation of the public, and of their servants and employees as well, safe cars. But the law does not require that cars which are safe shall be discarded, and others of more modern construction, and more convenient to board, shall be substituted in place of those of more ancient construction, and not so easy to board. What is a safe car is a mixed question of law and fact, and that is a safe car which the evidence may show to the satisfaction of the jury may be travelled in with safety by persons of ordinary intelligence, and who exercise ordinary caution while on the car, and while getting on and off the car; and if, therefore, the jury find from the evidence that defendant's car was a safe car, they cannot give a verdict for the plaintiff, but must find for the defendant. (3) If the jury believe from the evidence that the defendant's car was not a safe car, and that the plaintiff used ordinary caution in attempting to board the car when he received the injury to his person for which he sues to recover compensation, the jury will find for the plaintiff, and will assess his damages at such sum as, from the evidence, the jury deem just and proper." And, at the request of the defendant, gave this: "If the plaintiff knew of the alleged defect in said railway coach, or by the use of reasonable diligence could have known of said defect, then he cannot recover."

On the 22d of December appellee received directions from the president of the company to go up the road in the discharge of his duties. He left Indianola about one o'clock P.M. on the 26th, in obedience to such directions; and, when the train stopped at a tank about twelve miles from Indianola to take water, he left the train to give directions to employees at the tank about thawing the water-pipes, which were frozen; and as the train moved off from the tank, in attempting to enter at the forward end of the rear car, his foot slipped, and was caught and crushed by the wheel. The train was moving at the time at the speed of two or three miles per hour. The evidence is conflicting as to whether or not the bell rang, or whether or not the conductor notified appellee that the train was ready to start, and that appellee replied, "Go on; I can take care of myself," or words to that

effect. It was proved that appellant furnished appellee a hand-car, and men to propel it, for his use in the performance of his duties as road-master. It was proved that the coach on which appellee was injured had been in use on the road since 1872; that appellee had been road-master for the company for two years; that no one had ever been injured before because of any defect in the coach. The reports made by the conductor of the company showed that appellee had travelled frequently on that coach; 11 times during the month in which he was injured.

In regard to the insecurity of the car, and whether the defect, if any, was patent, the testimony was substantially as follows: The evidence of the conductor, Farnsworth, was: "I cannot say accurately what is the difference in the width of the coaches, nor the distance of the trucks from the platform. I should say that in all three of the cars they are about the same; and, if any difference, it could only be ascertained by measurement. I never observed the difference in the steps of the cars, or the peculiarity of the construction of the steps of the cars, before Ryan was hurt. The coach has been in use on the road since 1872. No other accident has ever happened on it. The coach is safe, and the steps are safe to mount." Ryan says, "The coach upon which I was hurt was a flat-roof coach which the company got from the Jackson road in Louisiana. It differed from the ordinary coach in the platform, and in the steps, and in the position of the trucks, and in the width of the car. On an ordinary coach, the steps come out flush with the end of the coach; in this, the steps dropped back some ten inches. The gauge of the road is four feet eight and a half inches. The steps of the coach are two feet and three-quarters of an inch above the rail. I consider it unsafe. It is too narrow for the gauge of the road. Steps are not out flush with body of coach, lack ten and one-sixteenth inches, and project over rail about one foot. Width of coach, eight feet nine and five-eighths inches. Coaches on roads of this gauge are usually nine feet six inches. Steps six inches higher from rail on this coach than on ordinary coaches. In ordinary coaches trucks are farther under the car, say twenty inches or two feet; and thus the distance from the nearest point of the truck to inside of steps is usually from twenty to twenty-four inches, instead of eight and a quarter inches, as in this coach. I had nothing to do with the train or the running of the cars, and my duties were entirely distinct from that of the train men." S. A. White says he was carpenter and master car-builder for defendant company from 1870 to 1878. "Knew the coach by which Ryan was hurt. It was not constructed as coaches are usually made. The coach was too narrow for the road, which brought the bottom step too near the rail, and made it unsafe,

especially to any person who attempted to board the same when in motion, and by the least slip or misstep a person would be likely to land on the rail and be crushed. Also the truck was too near the step or insill of the coach. The coach arrived from the Jackson road, and was landed at the wharf at Indianola. I called the attention of Mr. Henry Shepard and Mr. Poole — the latter being secretary and treasurer of the company — to this coach, and told them that the coach was narrower than they were usually made, and too narrow for the track." He agrees with Ryan as to the proper construction of passenger coaches, and says this coach was unsafe. J. C. Ballentyne describes the modern passenger-cars about as Ryan does, as does W. S. Moss; both being railroad men. They also say a car of the dimensions of the car by which Ryan was hurt is safe. J. M. Smith testified that he had been in the employ of the company since 1877. The car had been in use ever since then. "No accident has occurred from the alleged defect, except to Ryan, and the car is safe." Frank Martins testified to the same effect. Monserates, president of the company, testified to the same effect as Farnsworth, the conductor.

On the question of contributory negligence, the court instructed the jury as follows: "(4) If the jury believe, from the evidence, that the plaintiff was guilty of imprudence in directing the conductor of the train not to hold the train on his account; and in attempting, when in a state of intoxication, and in violation of the orders of his employers, to board the train after it was put in motion, and while it was proceeding slowly; and that by such imprudence the plaintiff contributed to the injury of which he complains, — then the question whether the car was unsafe becomes immaterial, and the jury must find for the defendant." The testimony is conflicting as to whether or not Ryan was intoxicated at the time he was injured, — about equal number of witnesses testifying on each side of the question, — and also as to whether he was notified by the conductor that the train was ready to start, and replied, "Go ahead; I can take care of myself." Ryan says he had taken two drinks; several witnesses testify that he was drunk; others, that he was not drunk. It was proved that it was against orders and rules of the company for persons to attempt to enter the cars while in motion, and that Ryan knew of these orders and rules. Several witnesses testified that it was not dangerous for an experienced railroad man to enter cars moving at the rate of two or three miles an hour.

Stockdale & Proctor for appellant.

A. B. Peticolas for appellee.

ACKER, J. — Appellee brought this suit to recover damages for personal injury, resulting in the amputation of his right leg below the knee. The petition alleged, substantially, that plaintiff was employed by defendant as road-
Facts.
 master, and on the 26th of December, 1879, left Indianola on defendant's train to go up the road in the performance of his duty, in obedience to directions given him on the 22d of that month; that at the tank twelve miles from Indianola, where the train stopped for water, he got off the train, and went to the tank to give directions to employees there about thawing the water-pipes, which were then frozen, it being in the line of his duty to do so; that the conductor and engineer in charge of the train were aware that he had left the train and gone to the tank, and put the train in motion without any signal or other warning to plaintiff, who, in the course of his employment, was compelled to go farther up the road; that while said train was running at a speed which did not render it dangerous, if the cars of defendant had been well constructed, for plaintiff to board said cars, plaintiff tried to get upon the passenger-car, and in attempting to do so his foot slipped, and while he held to the railing at the steps of the car, the truck of the passenger-car ran over his foot, which was thereby crushed, rendering amputation necessary, making him a cripple for life; that the cause of his injury was, that the car which he tried to board was so defective and dangerous in its construction that no one could with safety enter the same, whether in motion or not, which was unknown to plaintiff, but known to defendant; that the car was dangerous and defective in its construction, in this: that it was too narrow for the track, the steps too high and too nearly perpendicular from the rail, and the trucks too near the ends of the car, and consequently too near the steps; that the construction of said car was so defective and unsafe and unusual that the use of it by defendant upon its road was gross negligence, and that such negligence was the cause of plaintiff's injury; that if said car had been constructed as are cars in use by careful and diligent railway companies, plaintiff would not have been injured."

It is contended by appellant that the court erred in overruling its general demurrer to the petition, because it appears therefrom that plaintiff seeks to recover damages for injuries caused by the negligence of his fellow-servants, and there is no allegation of negligence or want of care in their selection by appellant; and for defects in the construction of the car, the defects stated being patent. Appellee does not here insist upon his right to recover on any ground other than the defective and dangerous construction of the car by which he was injured,
Negligence of fellow-servant. Injury caused by defective car.

though, on the trial below, there was testimony introduced before the jury on the question whether or not the train was put in motion by the conductor and engineer "without signal or otherwise;" but the court correctly instructed the jury that plaintiff was fellow-servant with the conductor and engineer, and could not recover against the common employer for damages caused by their negligence, there being no allegation or proof of want of care in their selection. *Price v. Navigation Co.*, 46 Tex. 537; *Robinson v. Railroad Co.*, Id. 541; *Railroad Co. v. Berry*, 5 S. W. Rep. 818. A railroad company is bound to furnish safe cars for the transportation of its employees, as well as others, who have the right to travel upon them; and if defendant's car was so defective and dangerous in its construction as to make its use gross negligence, as alleged in the petition, and such negligence was the proximate cause of the injury, plaintiff might recover, and we think the petition was sufficient on general demurrer. It is contended that the court erred in refusing to set aside the verdict, and grant a new trial, because the verdict is contrary to the law and the evidence, in this: that plaintiff attempted to board the train while in motion, contrary to the rules of the company, of which he had notice, and such attempt was negligence on the part of plaintiff, which was the proximate cause of his injury.

2. If there were any defects in the construction of the car, they were patent, and plaintiff knew, or might by ordinary diligence have known, of such defects.

3. Plaintiff attempted to enter at the front, instead of the back, end of the car, while in motion, he being intoxicated at the time, and was thereby injured in consequence of his own neglect and carelessness.

4. The evidence showed that the car was a safe car. It appears from the evidence that appellee was employed by appellant as road-master of its railroad, and had been so employed for about two years previous to the injury for which he seeks in this action to recover damages; and that appellant furnished him with a hand-cart, and men to propel it, for his use in the discharge of his duties, and that he was travelling on the train at his own option. The train was made up of several freight-cars, and one passenger-car attached. The rules of the company prohibited employees and others from attempting to enter the cars while in motion, and this rule was known to appellee. While the train was in motion, appellee attempted to enter at the front end of the car. His foot slipped, was caught by the wheel of the car, and was injured. The car had been used by appellant on its road ever since 1872, and appellee had frequently travelled on it. No

other person has ever been injured by this car. The car is constructed after an old model, differing from most passenger-cars now used, it being narrower, the trucks nearer the ends, the steps do not project as far outside of the track, and, consequently, are nearer to the rail. There was no depot or platform at the place where appellee was injured. There is no evidence tending to show that this car is less safe than cars of different construction, for persons attempting to enter it when not in motion at stations provided by the company for that purpose. There was evidence tending to show that appellee was intoxicated at the time he was injured. Several witnesses testify that he was "drunk;" about an equal number testify that he was not "drunk;" and he testifies that he had taken two drinks. An employer is bound to use due care to protect the safety of an employee; and if the employee *knowingly* and *intentionally* disobeys a reasonable rule or regulation established for his safety, unless he does so under the influence of fear produced by the appearance of sudden danger, and the act of disobedience is the *proximate cause* of the injury complained of, he cannot recover. **Employee disobeying rule cannot recover.** *Lyon v. Railroad Co.*, 31 Mich. 429; *Shanny v. Cotton Mills*, 66 Me. 429; *Railroad Co. v. Thomas*, 51 Miss. 637; *Railroad Co. v. Rhodes*, 56 Ga. 645.

We think the evidence is insufficient to sustain the verdict, and that the court erred in refusing to set it aside, and grant a new trial. For this error we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

WILLIE, C. J. — Report of commissioners of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

Injury to Employee while disobeying Rules. — See *Pennsylvania Co. v. Whitcomb*, 31 Am. & Eng. R. R. Cas. 149; *Darracutts v. Chesapeake & O. R. Co.*, and note, 31 Ib. 157, 166; *Reed v. Burlington, etc., R. Co.*, 31 Ib. 190; *Fay v. Minneapolis, etc., R. Co.*, 11 Ib. 193; *Luebke v. Chicago, etc., R. Co.*, 15 Ib. 183; *Leahy v. Southern Pacific R. Co.*, 15 Ib. 230; *McGrath v. New York, etc., R. Co.*, 18 Ib. 5; *Pringle v. Chicago, etc., R. Co.*, 18 Ib. 91; *Central R. Co. v. Mitchell*, 1 Ib. 145; *Atchison, etc., R. Co. v. Plunkett*, 2 Ib. 128; *Slater v. Jewett*, 5 Ib. 515; *Beems v. Chicago, etc., R. Co.*, 10 Ib. 658.

Duty of Company to make Rules for the Safe Management of Business. — One who employs servants in a complex and dangerous business, ought to supply rules sufficient for its order and safe management; and his failure to do so is a personal neglect, for the consequences of which he will be liable to his servants. It is feasible and proper for a railroad company to have some rules and regulations for the government of its employees in making flying switches and in the shunting and kicking of cars, for the warning of persons liable to be injured; and a petition which bases a charge of negli-

gence upon the company's failure to do so, states a cause of action. *Reagan v. St. Louis K. & N. R. Co.*, 93 Mo. 348. See also note, 1 Am. & Eng. R. R. Cas. 138; note, 5 Ib. 549; *Lake Shore, etc., R. Co. v. Lavalley*, 5 Ib. 549; *Sheehan v. New York, etc., R. Co.*, 12 Ib. 235; note, 28 Ib. 498.

Evidence as to Rule established after an Accident. — When an officer of the defendant railroad company testified, on direct examination, that, in his opinion, the rules and regulations of the company in reference to giving notice to employees of running of the extra trains, at the time of the accident in suit, were reasonable and sufficient, it was proper to permit him to be asked, on cross-examination (not for the purpose of showing negligence on the part of the company, but merely to show an inconsistency with his former statement), whether an additional regulation was not made after the accident. *Quinn v. New York & N. E. R. Co. (Conn)*, 5 N. Eng. Rep. 685.

Negligence of Company in not giving Train-Men Notice of Condition of Track when Repairs are being made. — In the action against a railroad company for negligently causing the death of a freight conductor, it appeared that the accident occurred while deceased was running his train at an immoderate rate of speed over a bridge which was being repaired, when the bridge gave way. *Held*, that the company was not negligent in not giving the trainmen notice of the condition of the track, where the conductor knew that the repairs were being made, and the "slow-boards" were out. *St. Louis I. M. & S. R. Co. v. Morgart (Ark.)*, 8 S. W. Rep. 179.

Injury to Servant passing along the Side of Track by being struck by Cars running with Nobody in Charge. — In *Chicago, N., & St. P. R. Co. v. Krueger (Ill.)*, 16 N. East. Rep. 52, an action against a railway company for personal injury, it appeared that plaintiff, while in the employ of defendant, was passing through a space between track of defendant's road, and an obstruction at the side which was four feet seven inches from the first rail, but was only two feet seven inches therefrom when a train was on the track, and a train of defendant's propelled by its own momentum, no person having charge of it, and no warning of its approach being given, came up behind plaintiff, striking him, and causing the injury. The court held that an instruction to the jury to give a verdict for defendant was properly refused.

DALEY

v.

BOSTON & ALBANY R. Co.

(Massachusetts Supreme Judicial Court, May 7, 1888.)

Shovellers of Coal from Vessels at Dock as Servants of Railroad Company. — Whether shovellers engaged in transferring coal from a vessel at a dock into the cars of a railroad company, the apparatus used belonging to such company and controlled by its servants, and the shovellers being paid from money received by the company from the ship-owners for unloading, are servants of such company, is a question of fact to be decided by the jury.

Transfer of Freight from Vessel to Cars as a Railroad Operation. — The transfer of freight by a railroad company from a vessel to its cars is a railroad operation within the meaning of Pub. St. Mass. c. 112, sect. 212, and St. 1883,

c. 243, providing for damages for death from the "negligence of a corporation operating a railroad."

Same. — Defective Appliance. — Duty to replace. — Where shovellers in the hold of a vessel inform their foreman that a rope has become weakened so that its further use is dangerous to them, and material and appliances for replacing it with a safe rope are provided by the employer, the question whether it was the duty of the shovellers or their foreman, or of the employer, to replace the weak rope with a safe one, is a question of fact for the jury.

EXCEPTIONS from Superior Court, Suffolk County; Thompson, Judge.

Two actions of tort, by Daniel A. Daley, administrator of the estate of Thomas Daley, against the Boston & Albany Railroad Company, to recover, in the first action, for the death of plaintiff's intestate under the statute, and in the second action, for the suffering sustained by plaintiff's intestate; the latter having been injured while at work on defendant's coal wharf, unloading a schooner, by the fall of a coal-bucket, which fell in consequence of a defect in the rope attached to the fall by which it was raised and lowered. At the trial the jury returned a verdict for the plaintiff in each case, — \$3,500 for the death of the intestate, and \$1,500 for the suffering; and the defendant excepted.

Samuel Hoar for defendant.

Richardson & Hale for plaintiff.

DEVENS, J. — The first bill of exceptions applies only to the first case, in which, at the trial, the plaintiff elected to strike out the second count of his amended declaration. As the cases were tried, the first action was to recover damages for the loss of life of Thomas Daley, the plaintiff's intestate, by his administrator, for the use of his children; Daley leaving no widow. The second was to recover damages for the suffering of Daley previous to his decease. There was a motion in the Superior Court, made at a term previous to the trial, by the plaintiff to amend the original declaration filed by him, with the writ, by filing two distinct counts, embracing the two causes of action above stated; and by the bill of exceptions it appears that "there was evidence tending to show that the plaintiff intended, when he brought his action, to set forth and rely upon a cause of action at common law for injuries and sufferings of his intestate, and also a cause of action under the statute for the death of his intestate." This evidence is fortified by an examination of the declaration itself, which must be construed as intending to include in one count two distinct causes of action, however imperfectly they or one of them may be stated. At the hearing of the motion the presiding judge declined to pass upon several rulings requested by the

Facts. Pleading.

defendant, except so far as they were involved in allowing the amendments, which he permitted. To this the defendant excepted. The rulings requested are to be examined only with a view of ascertaining whether they contain any legal proposition which in itself, or in connection with other facts appearing by the bill, rendered it erroneous to grant the plaintiff's application. A party is not entitled to rulings, correct in point of law as general propositions, which have no immediate bearing on the matter in dispute. *Fish v. Bangs*, 113 Mass. 123.

As the original declaration itself, and the evidence before the judge, tended to show that the plaintiff intended to rely on both the causes of action stated, it must be deemed that by granting the amendment which permitted the plaintiff to restate them in two distinct counts, the court decided that the plaintiff did thus intend. This must be held to have been involved in its decision, when nothing appears showing that it rested the leave to amend upon any other ground. Even if it is true that the one cause, that at common law, was well set forth, and the other, that arising under and by virtue of the statute, but imperfectly so, this affords no reason why an amendment of the latter should not be made. An accurate statement is the object which the amendment seeks to attain. It is true, as the defendant contends, that the court cannot permit a plaintiff to amend his declaration so as to sustain his action for a cause for which he did not intend originally to bring it; but the court was not required, at the request of the defendant, to lay down this abstract proposition. The argument of the defendant is, that the court may have found that the plaintiff did not originally intend to bring his action for the cause arising under the statute, as it refused to formally rule on the propositions requested. A bill of exceptions is, however, to show affirmatively some error committed by the court below. As it may well have been that the court may have found that the plaintiff did intend to bring his action under the statute, and as all inferences are to be in favor of the result reached by it in permitting the amendment, no ground of exception appears.

The defendant further contends that the plaintiff could not be permitted to amend by putting two causes of action, which could not be thus joined, into one suit, and that such was the effect of the amendment. The court had authority to permit the declaration to be so amended as to properly state the causes for which it was brought. The effect of this amendment was not immediately in question. If the result was that the declaration as thus amended was demurrable, or that the plaintiff could be compelled, before proceeding to trial, to abandon one or the other count, that was a matter to be thereafter decided. The entry will therefore be, as to the first bill, exceptions overruled.

The second bill includes exceptions taken in both cases at the trials, which were conducted together. They may be considered conveniently together, as they were taken. The fundamental question in the case was whether the plaintiff's intestate, when the injury occurred, was an employee of the defendant. That it was the duty of the schooner to place the coal on the wharf of the defendant, and to bear the expense thereof, was admitted. It is also equally clear that the work of loading it into their cars belonged to the defendant. The two operations were performed as one, although successively; the coal, as it was hoisted from the schooner, being put into the barrows of defendant, to be carried to their cars. The engine, and all the apparatus used, belonged to the defendant, and the engineer was its servant. The dock-master of defendant, one Thornton, had the general direction and control of its wharves at East Boston, and was assisted by one Carey. He assigned the berths to the schooners as they arrived. He employed the foreman of the gang (known as the stageman) who unloaded the schooner, who was also paid by the defendant, and gave him directions when to proceed, and put out the coal. If there were any delay in the work, it was the duty of the stageman to report to him. There was also evidence that the schooner paid to the defendant's local cashier twenty-five cents a ton for discharging the cargo; that he retained for the defendant a certain portion for the use of its apparatus, and delivered another to the foreman of the gang who unloaded the vessel, and who divided it among the men. The work of unloading the schooner John H. Kranz, in the course of which Daley was injured, proceeded in this way.

Whether
intestate was
employee of
defendant.

The defendant asked the court to instruct the jury that there was no evidence of any authority from the defendant to Thornton to employ men as shovellers. This should not have been given. There was evidence of a general authority on his part as to the unloading, from which such authority might be inferred; and it was also immaterial whether the men were employed by Thornton, or by some one else entitled to act for the defendant. The material question was whether these men were actually in the employ of the defendant corporation. If the corporation was actually doing the work of unloading the vessel, having charge and direction of it through its upper servants, and authorized to control the laborers engaged in it, and was also receiving pay from the party bound to bear the expense of it, those engaged in it were its servants. It cannot make any difference whether the men employed were hired by it for the month or year or job, or whether they received a fixed sum, or a portion of the sum received by the defendant from the schooner, if they were entitled

to look to defendant, and not to the schooner, for their compensation. The instructions were in accordance with this; and there was certainly evidence, although upon this point there was conflict, that Thornton employed other men than Gallagher, the foreman or stageman; that he discharged the whole "gang," as it was termed, of shovellers, at a time previous, and afterwards took them back; that he refused employment to some men; that he had control of the run or platform; that he directed men when to go on, and when to stop work.

The defendant contends that the evidence, if any thing, showed a relation of contractor and contractee between the gang and the defendant, and that such should have been the ruling.

Same. A
question for
the jury.

This position does not appear to have been taken at the trial, nor did the defendant desire to have the inquiry submitted to the jury whether the laborers were not independent contractors, performing a particular job contracted for by their foreman. If it had been so submitted, the evidence that the engineer and stageman were directly hired by Thornton, and in a general way directed by him, together with the other evidence above recited, would fully have justified a finding that the relation of master and servant existed between the defendant and the laborers. The answer to the inquiry whether Daley and the gang of laborers were the servants of the defendant, depended upon numerous circumstances, more or less disputed and complicated, and was properly left, as a question of fact, to be decided by the jury.

The defendant further contends, that, as the business of unloading vessels is a business distinct from that of operating a railroad, even if the injury was the result of the negligence of the defendant, it cannot be held to be the result "of the negligence or carelessness of a corporation operating a railroad." Pub. St. c. 112, sect. 212; St. 1883, c. 243. Pub. St. c. 112, sect. 212, provides that when the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger, nor in the employment of such corporation, is lost "by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business," not less than \$500 nor more than \$5,000 may be recovered, by indictment, to the use of certain persons named. The second clause of the same section provides, that, "if the corporation is a railroad corporation, it shall also be liable in damages not exceeding five thousand dollars nor less than five hundred dollars," in an action of tort, to the executor or administrator, to the use of the same persons specified in the indictment. It is provided

Unloading
vessel was a
railroad
operation.

that only one of these remedies can be availed of. St. 1883, c. 243, amends this section by inserting, after the provision as to an indictment, "and if any employee of such corporation, being in the exercise of due care, is killed under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee." The words "operating a railroad" in Pub. St. c. 112, sect. 212, describes the kind of corporation intended to be subjected to the liability there imposed, and not the work immediately in the process of performance by it. Even if they could be held to limit the liability to occasions when the railroads are being actually operated, they would not limit it to accidents occasioned by locomotives, moving trains, etc., or only upon its tracks. The handling of its freight, the loading and unloading of its cars, or the transfer, as in the case at bar, of freight from a vessel to its cars, are railroad operations.

The defendant further urges that it is clearly shown that the defendant discharged his whole duty to the plaintiff's intestate, and that there was no evidence of negligence on the part of defendant which could properly be submitted to a jury. This argument is upon the theory that the only contention that could have been made by the plaintiff was, that the defendant was negligent in not supplying a suitable and safe fall, and that as to that matter the defendant did its whole duty. It is the duty of the master to exercise ordinary care in supplying and maintaining machinery, appliances, and instrumentalities; and if the servant, exercising ordinary care, is injured by a deficiency therein, he is entitled to recover damages. The servant charged with providing these appliances stands in the place of the master, and performs the duty incumbent on him. It is not sufficient that he is an intelligent and competent servant. If he neglects this, the master is still responsible, unless he shall himself have exercised a reasonable care and supervision over him in seeing that the machinery was in proper condition. Nor is it enough that the master has employed suitable servants, and furnished them with suitable materials, and instructed them to keep the machinery in repair. He must see that such servants do their duty. *Rogers v. Manufacturing Co.*, 144 Mass. 198; *Elmer v. Locke*, 135 Mass. 576. The making of such ordinary repairs as the machine requires, from day to day, and which are intended to be done as a part of its operation by those engaged in running the machine, may be intrusted to them, or to some among them; and if the master employs competent servants for that purpose, and supplies them

The question of
defendant's
negligence.

with suitable means, the master performs his duty. Such servants are fellow-servants with those employed only to use the machine. *Johnson v. Boat Co.*, 135 Mass. 209; *McGee v. Cordage Co.*, 139 Mass. 445. The injury, in the case at bar, occurred, not from careless handling or management of the fall, but from the defective character of the rope used. There was ample evidence that it was the duty of Carey, who was the assistant of Thornton, to repair, splice, and fit the ropes used. Each gang of men had its own fall. The defendant has argued that, even if it was the fault of Carey or Thornton that a defective rope was used, it was the negligence of a fellow-servant who was provided with suitable material (as there was an additional fall at his disposal), and who was himself a competent man. We do not perceive, at the trial, that the defendant took the position that Daley, the deceased, was a fellow-servant of Carey or Thornton. He relied on the fact that Gallagher might have got a new fall by asking for it, and that as he, or the gang of which he was foreman, did not ask for it, the plaintiff could not recover. His fifth request was, "If there was another rope or fall accessible to Gallagher, or which he could have had by inquiring for it, and it was his duty to get it, or ask for it, upon his discovering the weakness of the one in use, and he negligently omitted to do so, and went to work, and by reason of the omission the accident occurred, the plaintiff cannot recover in either action." The judge, in his charge, submitted to the jury the inquiry whether, as the workmen were employed, it was their duty, if the rope became apparently weak or gave out, to go and get a new one to replace the old one, and whether such had been provided at a convenient place by the defendant, or whether it was the duty of the defendant corporation to see that a proper rope was provided. He also restated, in answer to the objection of the defendant to the part of the charge relating to the inquiry whether it was the duty of the men to see that the rope was a proper one, and, if not, to get another, the general principle with regard to men in the employ of another, in these words: "Where there is used such kind of appliances that from time to time it is necessary to supply a part or a portion, and the material for that supply is provided by the corporation, that, if it is the duty of the men who are employed, or either of the gang, — Gallagher or either of them, — if it is their duty, in the gang, or if it is the duty of either of them, to get and replace these themselves, then, of course, they cannot recover, because it would be a failure to perform their duty, or the failure on the part of a fellow-servant to perform his duty; and I left it to you to say, under all the testimony here, whether or not this was the duty of the gang, or whether it was the duty of the defendant corporation to supply.

this fall, and to reasonably look after it, and see that it was in a reasonably safe and proper condition for use." To which the defendant excepted. We do not see why the request of the defendant was not substantially complied with. Both the request and the instruction, assuming that the fall was defective, place the responsibility on the gang if it was the duty of Gallagher or the gang to replace it, or see that it was replaced, and the means of replacing had been provided by the corporation. The request is, that if the rope or fall was accessible, and Gallagher could have had it by inquiring for it, and it was his duty to get it, or ask for it, on discovering, etc., then the plaintiff cannot recover. The instruction does not use the words "ask for it;" but it clearly denies to the plaintiff the right to recover if the duty of seeing that the rope was sound, and, if not sound, of replacing it, rested upon Gallagher, or either of the gang, and the means were accessible. The defendant urges that the instruction given was erroneous on this point, because it says, "If the jury should find that it was the duty of Carey or Thornton to" get and replace "the new fall, on being notified by Gallagher, or any one else, of the necessity for so doing, they would be fellow-servants of the plaintiff's intestate, precisely as Gallagher would have been if it were his duty; and the plaintiff could not recover for negligence on the part of Carey and Thornton in that case." This is not a sound argument. The instruction requested and that given dealt only with the duty of the gang or its foreman on the one side, and the corporation on the other. The judge did not undertake to define what the relations of Carey and Thornton were, and to what extent the corporation would be responsible for their acts or neglect. The defendant had requested no instruction upon the theory that Carey or Thornton were, if they had neglected their duty, — it being their duty to see to it that the fall was in good condition, — still fellow-servants of the plaintiff, and therefore that he could not recover. It contends that, under the instructions given, the jury must find for the plaintiff, if the duty of getting and replacing the rope was not on the gang, even though, having the duty of getting and replacing, Thornton and Carey were free from negligence. Nothing of this sort is said by the presiding judge. The case was, without doubt, tried on the theory, of which there is ample evidence disclosed by the exceptions, that there was great negligence on the part of some one in permitting a gang of men to go to work with a fall provided with so wretched a rope, and that this negligence was either the fault of Gallagher, who had the immediate control of the work of the laborers, and directed the actual performance of the work, or of the servants of the defendant, Carey and Thornton, who

had no share in the actual work, but through whom the appliances and instrumentalities of the work were supplied. If it was the fault of the latter, the defendant does not appear to have controverted its responsibility. If the defendant had desired instructions as to the responsibility of the defendant for Carey and Thornton, they should have been asked. Nor does it appear that instructions on this subject were not given by the judge, as only so much of his charge is reported as related to the exceptions taken.

The instructions given in answer to the fifth request of defendant were sufficiently favorable to defendant. Whether, if Gallagher had been guilty of neglect in seeing to it that the rope was sufficient, and, observing that it was insufficient, in failing to get and replace it by another, this was to be considered the neglect of a fellow-servant strictly, which would deprive the plaintiff of his right to recover, or of the master who had intrusted the duty to Gallagher, it is not now necessary to discuss in view of the instructions given. In *Johnson v. Boat Co.*, 135 Mass. 209, it was held that where three men worked together on a small boat, which was provided with a rope to replace that in actual use, as it might become decayed, and one was the foreman "to superintend the work of the men, and the use and condition of the apparatus upon his boat," the negligence of such foreman was the neglect of a fellow-servant. But there is a difference, and there may be a legal distinction, between that case, where something is necessary to be done from time to time to keep a machine in working order, as by replacing a rope, and the foreman is provided with and has in his own control the means of doing this, and one in which it is his duty to apply for and thus obtain the means of replacing a rotten rope. In the first it is a part of his duty, in working the machine, to stop it from time to time, for the purpose of repairing it from the materials in his hands; but if he is only to get the materials by asking for them, even if it is made his duty to ask, the control of the repairs is with those who are to provide the machinery, rather than those who are to work it. It might be for them to determine whether the machine should be stopped and the repairs made, and the neglect of the foremen to report its condition might, perhaps, be treated rather as a neglect of the master, who is to provide suitable machinery, than of the servant, whose duty it is to handle it properly. It was not contended that the plaintiff's intestate had any knowledge of the weakness of the rope. The facts out of which the duties of Gallagher and the gang on the one side, and of Thornton, Carey, and the defendant on the other, arose, were in dispute. What were those duties, respectively, depended on these facts; and, under proper instructions, it was

for the jury to determine what those relations were. *Clark v. Soule*, 137 Mass. 380. Under the instructions as given, it must have decided that it was the duty of Carey and Thornton to have seen to it that there was a sufficient rope in the fall provided for the use of the gang to which the plaintiff's intestate belonged, and that the neglect so to do was that of the master. Exceptions overruled.

Who are Servants.— See *Pennsylvania R. Co. v. Price*, and note, 1 Am. & Eng. R. R. Cas. 234-239.

Train of one Company on Track of another Company.— Plaintiff's husband, an employee of the Port Royal R. Co., was killed by an accident while the train of the former was on the track of the Augusta road. *Held*, in an action for damages, that deceased was not an employee of the Augusta road. *Augusta & K. R. Co. v. Killain* (Ga.), 4 S. East. Rep. 165.

Person operating Ditching-Machine is "connected with Use and Operation" of Railway under Iowa Code.— Under Code Iowa, sect. 1307, providing for the recovery of damages suffered by reason of the negligence of a co-employee, "connected with the use and operation" of a railway, a person injured in operating a ditching-machine which is carried on a car, and worked by the movement of the car on the railroad track, comes within the provision, and evidence tending to show that the injury was caused by the negligence of co-employees should be submitted to the jury. *Nelson v. Chicago, M. & St. P. R. Co.* (Iowa), 35 N. W. Rep. 611.

Injury received in Attempting to board a Moving Train occurs within the "Use and Operation of the Train" under Code Iowa.— Code Iowa, sect. 1307, provides that railroad corporations shall be liable to persons or employees for damages sustained by neglect of agents, mismanagement of engineers, or wilful wrong by them or other employees, when connected with the use and operation of a train. Plaintiff, a section-hand in the employ of defendant, was directed to get on a loaded moving train by the conductor and others in charge of the train, to go to another place to help unload it, and in attempting to do so was thrown down, and received personal injuries. *Held*, that such injuries occurred in the "use and operation" of the train, within the meaning of the statute. *Rayburn v. Central Iowa R. Co.* (Iowa), 35 N. W. Rep. 606.

Injury to Volunteer assisting Brakeman under Direction of Yard-Master.— A person who without pay assists as a brakeman in making up a railroad train by the direction or with the express permission of a yard-master who has authority to employ necessary assistants in his department, is not a trespasser on the train, but a servant of the company, and it will be liable to him for an injury resulting from the use of a defective brake. *Central Trust Co. v. Texas & St. Louis R. Co.*, 32 Fed. Rep. 448.

CHESAPEAKE, OHIO, & SOUTH-WESTERN R. Co

v.

McMANNON.

(*Kentucky Court of Appeals, April 26, 1888.*)

Incompetent Fellow-Servant. — Knowledge of Master. — A railroad company whose agent knowingly employs and retains an incompetent switchman, is liable for injuries to a fellow-switchman sustained through the incompetency of the switchman so employed and retained, when it appears that the injured switchman did not know, and had not the means of knowing, of the incompetency of his fellow-servant.

APPEAL from Circuit Court, Muhlenburg County.

Action for personal injuries by M. H. McMannon against the Chesapeake, Ohio, & South-western Railroad Company. Judgment for plaintiff, and defendant appeals.

Holmes Cummins and *P. H. Darby* for appellant.

R. C. Davis and *Matt. O. Doherty* for appellee.

PRYOR, C. J. — This action was instituted in the court below to recover compensation for a personal injury received by the appellee by reason of the gross negligence of certain employees of the appellant, the one a switchman, and the other an engineer. The appellee, while uncoupling cars in the capacity of switchman at Central City, on appellant's road, had his arm badly mashed between two freight-cars, rendering amputation necessary, the arm having been taken off above the elbow. The injury was caused by the engineer moving the engine back in response to a signal given by one Kittenger, who was a fellow-switchman with the appellee in the same yard. The right of recovery for the neglect of Kittenger, who was in the same grade of employment, consists in his alleged incompetency for the position, and the further averment that his incompetency was known to the appellant. (2) That Campbell, the engineer, by the exercise of the slightest care, might have known the danger of the appellee at the time, and avoided the injury; that he was guilty of gross negligence. The appellant, after traversing the material facts alleged in the petition, pleaded that the injury was caused alone by want of proper care on the part of the appellee. Upon these issues, the case went to the jury, and a verdict returned for \$5,750. A number of special

interrogatories were propounded to the jury; thirteen in number for the plaintiff, and forty-five at the instance of the defendant.

In regard to the alleged negligence of a fellow-laborer by reason of his incompetency in the same grade of employment, it must appear, not only that the employee was incompetent, but that the principal knew he was incompetent, or by reasonable inquiry could have ascertained the fact. In other words, "he must at his peril exercise reasonable care in the selection of the appliances of his business and of co-servants; and, if he fail to do this, the employer will be responsible to the employee who is injured by the neglect of a fellow-servant while in his employment, although in the same grade of labor." Wood, Mast. & Serv. 825. This rule is qualified to the extent, that, if the co-laborer complaining of the neglect knew or had the same means of knowledge as to the incompetency that the employer had, then no recovery can be had. The jury, in response to interrogatory No. 1, find that Kittenger was an incompetent switchman; and, in response to No. 2, say that this incompetency was known to defendant's agent prior to and at the time of the injury. They also find that McNair, the yard-master, knew that Kittenger was incompetent when he employed him. The appellant insists that these special findings are not sustained by the evidence, and therefore this judgment should be reversed. We have examined this record carefully, and the facts developed show a clear case of negligence on the part of these employees, by which this appellee lost his arm; and, while the alleged incompetency of Kittenger may be doubted from the testimony, it appears from the statements of McNair, who was at the time in the employ of the company as assistant yard-master, that he employed Kittenger under protest, and by reason alone of the direction of his superior. He knew of his unfitness for the place, and so informed his superior; and, although contradicted in those statements, it was with the jury to determine to which of these statements they would give credence: and this court will not interfere to say they should have decided otherwise, when Kittenger's own conduct shows a degree of neglect on his part that fully corroborates the statements made by McNair, and shows him unfit for the position assigned him. He seems never to have seen or heard the cars move the one way or the other at the time of the injury, although he was giving signals that resulted in this serious injury; and, while others standing near saw appellee's danger, those of the employees whose duty it was to exercise some skill and judgment to prevent such accidents failed to exercise the slightest caution. Appellée gave what is known as

Master's liability for injuries caused by incompetent servants.

Findings of jury.

Evidence to sustain findings.

the "steady signal," indicating to the engineer that he was about to uncouple the cars. This signal was reported by the fireman to the engineer, who stopped the cars; and the appellee went in to uncouple the cars, when Kittenger gave the signal to back, which was done, and the appellee's arm crushed. The fireman had notified the engineer of the appellee's position, and knew, as he swears, that the injured man had not been given time sufficient to uncouple the cars and avoid danger from the time of the steady signal given by him to that of the fast signal given by Kittenger. The fireman called to the engineer to stop; but it was then too late, as it was then impossible to have prevented the accident. This court is not conversant with the manner in which these signals should be given; but, where the coupling and uncoupling of cars is of constant occurrence, it seems to us that the party entering and performing the task should give the signal of its completion, and not leave the signal to be given by those who might not even be aware at the time that any one was engaged in the act of uncoupling, as seems to have been the case here. We are not disposed to question the truth of the finding by the jury that the engineer was guilty of gross neglect; and, while his act is to be attributed to the incompetency of Kittenger, it seems to us that he should have been as well informed, at least, as the fireman May, as to the dangerous position of the appellee when this fast signal was given by Kittenger.

We have devoted but little time to the consideration of the instructions given by the court, or those refused, because the findings of fact by the jury determine the right of recovery by the appellee. The general instruction No. 2, given for the plaintiff, embodied, in substance, the law of this case. The jury were told, that if Kittenger was incompetent to discharge the duties of yard-switchman in defendant's service, and that the defendant, or any of its agents charged at the time with the duty of employing and discharging such employees, knew of, or by the exercise of ordinary care could have known of, such incompetency on the part of Kittenger, and, notwithstanding such knowledge or means of knowledge, retained him, and that said unfitness was unknown to the plaintiff, and the plaintiff while in the discharge of his duty, and without any contributory fault on his part, was injured by reason of the incompetency of Kittenger, etc., they should find for the plaintiff. While this instruction may have omitted to convey the idea that if the appellee had the same means of knowledge that the defendant had, and nevertheless continued in the service, they should find for the defendant, the jury has, in effect, said by their special finding that the appellee was ignorant of his incompetency, and had no means of ascertaining it; and therefore this omission.

could not have prejudiced the defendant in any manner. Besides, the jury was told, for the defendant, that, while it was the duty of the defendant to exercise reasonable care and judgment in the selection of its employees, it does not guarantee the competency or fitness of its employees; and, if it did exercise reasonable care in the employment of Kittenger, it is not liable to the plaintiff on account of said employment, although the jury may, in fact, believe he was unfit for the position. The jury was also told, that, if the plaintiff and Kittenger were in the same grade of labor when the accident occurred, the law is for the defendant, unless they believe the defendant was guilty of negligence in employing and continuing Kittenger in its service. The jury was also instructed as to contributory neglect, if any, on the part of the plaintiff: and we find nothing in the record authorizing a reversal, unless this court could invade the province of the jury, and determine the issues upon the mere weight of the testimony; and then it could only be argued that a bare preponderance of the testimony established the competency of defendant's employee. The judgment, in our opinion, should be affirmed.

Incompetency of Fellow-Servants. — See *Evansville & T. H. R. Co. v. Guyton*, and note, *infra*.

EVANSVILLE & TERRE HAUTE R. CO.

v.

GUYTON.

(*Indiana Supreme Court, May 10, 1888.*)

Liability of Railroad for Injuries caused by Incompetency of Fellow-Servant. — A railroad company placing one of its brakemen in a position where peculiar fitness is required, without being assured of his competency by instituting special inquiries, or from previous like service, is liable for any injuries which may happen to a fellow-servant, without notice, the proximate cause of which was the incompetency of such brakeman.

Evidence to show Incompetency. — A conductor, having been but recently promoted from the position of brakeman, but without test as to his qualifications by any special examination, who is placed in charge of a "wild train," a service demanding special skill, and who causes a collision owing to his neglect of an order, in which a brakeman on the train was injured, is incompetent for the position in which he was placed, and the company is remiss in its duty in selecting him, and is liable to the brakeman for the injuries he received.

Same. — Evidence of a Single Negligent Act. — The bringing of two railroad trains into collision is such a negligent act, that evidence of that act alone will suffice to show the incompetency of the conductor who caused it.

Filling Vacancies by Promotion. — Wisdom of Policy Is for Jury. — The wisdom of a policy of a railroad company of filling all vacancies by promotion from lower positions, is a question of fact for the jury.

Personal Injuries. — Evidence appealing to Feelings of Jury. — The injured brakeman was permitted to show at the trial, that, immediately after the collision, he performed with great pain and effort the duty of flagging an approaching passenger-train, and then fell and became unconscious. *Held*, that the evidence was admissible to show the extent of his injuries and suffering, and was not an improper appeal to the feeling of the jury.

Instruction as to Negligence on other Occasions. — The railroad company admitted the conductor's negligence, but denied that he was incompetent, and asked the court to charge that specific acts of negligence on other occasions are not competent to show negligence on this occasion. *Held*, that although such instruction states the law correctly, yet it was inapplicable to the defence set up, and was properly refused.

APPEAL from a judgment of the Gibson Circuit Court, Wellborn, J., against the defendant in an action for injury to a brakeman through the neglect of a conductor. Affirmed.

The facts are stated in the opinion.

Asa Iglehart, John E. Iglehart, and Edwin Taylor for appellant.

Alex. Gilchrist, C. A. De Bruler, and D. B. Kumler for appellee.

MITCHELL, Ch. J. — Guyton was severely injured in a collision which occurred on the appellant railway company's road on the twentieth day of August, 1882, while serving in the capacity of brakeman on one of the company's trains. He brought an action to recover damages for the injuries sustained, and recovered a judgment in the Gibson Circuit Court, from which this appeal is prosecuted.

His case proceeded upon the theory that the collision resulted from the incompetency of Charles Stice, the conductor who had control of the train upon which the plaintiff was at the time employed as brakeman; and that the liability of the company grew out of its failure to exercise proper care in the selection of conductor Stice, whose alleged incapacity resulted in the collision.

There are certain undisputed facts in the case. For instance, there is no dispute but that the railway company put Charles Stice in charge of a "wild train," as conductor, to run from Terre Haute to Evansville, on the date above mentioned; and that the train was being run upon telegraphic orders, and not upon schedule time. The plaintiff was a brakeman on this train, which was called the "C. & E. Train, special." Some fourteen miles from Vincennes, at a station called Oaktown, Stice received a message from the train despatcher of the following tenor: —

C. & E. Train, Special:

Run to Vincennes freight station regardless second section train twenty (20), and to Smith's regardless eighteen (18).

C. J. H.

Smith's is a station between Oaktown and Vincennes. It is conceded that the meaning of the despatch, as it would or should have been understood by a competent conductor, in connection with the schedule for regular trains, with which train despatchers assume conductors are familiar, was that Stice should run his train to Smith's, and wait there until No. 18, a schedule train, and until the first section of No. 20, another schedule train, should pass, and then run to Vincennes, regardless of the second section of train 20. Instead of properly interpreting and executing the order, which is shown to have been correctly given, the conductor ran his train to Smith's, waited until No. 18 passed, and then, although it was within a few minutes of the regular schedule time of No. 20, started out with his wild train, under the mistaken impression that he was to run to Vincennes regardless of No. 20. The result was a collision between the wild train and the first section of No. 20, which was on its regular time, within a few miles of Smith's.

The evidence tends to show that Stice had been in the service of the company, as brakeman, for a period of six or seven years prior to the accident, and that he had been promoted to the position of freight conductor within a period of less than a month before the collision. The testimony preponderates strongly — we may say overwhelmingly — in favor of the general good character, competency, and skill of the conductor while serving in the capacity of brakeman, and of his general qualifications to act as conductor of a freight-train. He testified that he understood the order above set out, and that his pulling out his train in disobedience of it was the result of thoughtlessness, and a mistake.

There was some testimony, however, from which the jury may have found that he was not possessed of sufficient familiarity with the time-cards and with the technical language of train orders, and was not sufficiently quick of apprehension to be able to construe and interpret an order in connection with a time-card so as to be competent to act as the conductor of a wild train.

In view of the fact that Stice had been promoted to the position of conductor but recently before the accident, and that more than ordinary vigilance and aptitude were required for the control and safe management of trains such as the one he was intrusted with, and in view of the further fact that there is some evidence which tends to show that, contrary to the requirements of the general rules of the company, Stice had been assigned to duty as a conductor without the usual inquiry or examination in respect to his qualifications, we are constrained to hold that the evidence tends to support what must have been found by the

**The conductor's
incompetency.
Negligence of
company in
selecting him.**

jury; viz., that Stice was incompetent to act as conductor of a wild train, and that the railroad company was remiss in its duty in selecting him for that service.

While the railroad company, in relation to the plaintiff, was not bound to guarantee the absolute fitness of the conductor, it was its duty, nevertheless, to exercise reasonable and ordinary diligence, having respect for the exigencies of the particular service, to the end that it might ascertain the qualification and competency of the conductor, and whether or not he was fit to be intrusted with the responsible station to which he was assigned.

Wabash R. Co. v. McDaniels, 107 U. S. 454; s. c., 11 Am. & Eng. R. R. Cas. 158; Patterson, R. Acc. L. 313.

In employing its subordinates it was the duty of the company to exercise a degree of care commensurate with the responsibilities of the position in which they are to be placed, and with the consequences which might ensue from incompetence or unskillfulness on the part of those employed. In case peculiar fitness was required, or special qualifications demanded for the service to be performed, unless it was assured, by the previous like service of the conductor, of his fitness, the duty of the company required it to institute affirmative inquiries in order to ascertain his qualification in that regard.

In case an employee proves to be incompetent for the duty assigned him, and ordinary care has not been used in his selection, or if he be retained after notice of his incompetency, the employer will be liable to a co-employee whose injury results proximately from the lack of qualification of the fellow-servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice. Pennsylvania Co. v. Roney, 89 Ind. 453; s. c., 12 Am. & Eng. R. R. Cas. 223; Lake Shore & M. S. R. Co. v. Stupak, 108 Ind. 1; s. c., 28 Am. & Eng. R. R. Cas. 323; Pittsburgh, Ft. W. & C. R. Co. v. Ruby, 38 Ind. 294; Chapman v. Erie R. Co., 55 N. Y. 579; Mann v. Delaware & H. Canal Co., 91 N. Y. 495; s. c., 12 Am. & Eng. R. R. Cas. 199; Baulec v. New York & H. R. R. Co., 59 N. Y. 356.

It may be conceded that the evidence in the record fully establishes the fact, that Stice had been for years a faithful, vigilant, and competent brakeman, and that he had fairly earned his recent promotion to the position of freight conductor by long and diligent service for the company; and the idea is not to be tolerated, that the law will pronounce a person who is shown to be qualified by years of efficient service, incompetent because of a single

Company's liability to injured fellow-servant.

Evidence to show incompetency. Single act.

mistake or act of forgetfulness. The fact cannot, however, be disguised, that a single act with the circumstances surrounding it, where the consequences are so overwhelming as the bringing of two trains of cars, running at a high rate of speed, into collision on the same railroad track, may tend very strongly to show the incompetency of the actor to perform the service to which he was assigned.

It should be remembered, that Stice had served the company as brakeman until quite recently before the unfortunate accident; and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor, it does not follow, without more, that because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train. These considerations lead us to conclude that we cannot disturb the verdict and judgment on the evidence.

At the trial, the plaintiff, after stating how the accident occurred, and the manner and extent of his injury, was permitted to state, over objection, that as soon as he had extricated himself from the wreck produced by the collision, it occurred to him that a passenger-train designated as No. 5 would be due at that point in a short time, and remembering that, as brakeman, it was his duty to flag the approaching train so as to prevent it from running into the wreck, he proceeded, in the disabled and suffering condition in which he described himself, along the track in the direction from which the train was approaching, for the distance of about one-fourth of a mile, and flagged the train. He was permitted to state, that, in getting the flag, he had fallen out of the caboose from weakness and loss of blood, and that he suffered great pain in going back to discharge the duty which he felt was incumbent upon him; and that, after flagging the train, and entering one of the cars, he fell, unconscious, in which condition he remained until the next day. It is objected that this testimony was improperly admitted, and that it could only have been introduced for the purpose of exciting the sympathy of the jury in the plaintiff's behalf, and to induce them to compensate him for what might be considered a praiseworthy act, instead of compensating him for the injuries resulting from the collision. The testimony was competent. It was admissible, not because the act of flagging the train — however meritorious that was — could be considered by the jury in fixing the amount of compensation, but because the plaintiff was entitled to recover not only for the permanent injury sustained, but for the physical pain and mental suffering occasioned by the injury. He was entitled to communicate to the jury the character and extent of

Brakeman's
evidence.
Appeal to feelings of jury.

his injury, and the nature and intensity of the suffering resulting therefrom. If the plaintiff had voluntarily walked a quarter of a mile, or any other distance, immediately after receiving the injury, and, after enduring great suffering, had been taken up by a passing train, and had thereupon become unconscious from pain, exhaustion, and loss of blood resulting from the injury, it cannot be doubted that the facts might have been stated. The facts, following immediately in connection with the injury, are none the less admissible because the plaintiff was impelled to exert himself by a high sense of duty to those on the approaching train. As brakeman upon the wrecked train, it was the plaintiff's duty, as it appeared to him under the circumstances, to flag the on-coming passenger-train, and prevent the destruction of human life which might have followed had no warning been given. This was the highest conception of the duty of a brakeman. That the plaintiff had the courage and manliness to perform it, regardless of his own suffering, is to be spoken of in commendation and praise.

Some other rulings of the court relating to the admission of evidence upon matters of minor importance are the subjects of criticism. We have examined the questions, and, without delaying to state them in detail, we have been unable to discover any error in that connection.

Other objections passed over.

So in respect to certain alleged extra-professional statements made by counsel in addressing the jury, of which the appellant complains, it is only necessary to say, if the legitimate privileges of debate were violated, the matter was set right by the court in such manner as that no harm could have resulted.

The objections to the instructions given by the court upon the request of the plaintiff below are not of sufficient importance, nor are they presented in such a manner, as to require that they be separately stated and commented upon. A careful examination fails to disclose any valid objection to those complained of.

The appellant complains on account of the refusal of the court to give the following instruction:—

“It is the part of wisdom for railroad corporations to take men employed by them from inferior positions, and place them in higher ones, as they thus hold out the highest inducement to those in their employ to become skilful and faithful in the performance of their duties. The company has the means of ascertaining accurately the habits and character of its men, and to fill all vacancies with those who are known to be skilful and deserving.”

Instructions. Policy of promoting employees.

As a statement of the general policy proper to be observed by railroad corporations in respect to the advancement of their

employees, the instruction asked was certainly, so far as we are advised, unobjectionable ; but the instances are rare in which it is proper for a court to declare, as matter of law, whether or not a certain policy, as applied to the management of a particular business, is wise or unwise. These are questions of fact for the jury, rather than questions of law for the court. *Unruh v. State*, 105 Ind. 117. Instructions should state legal principles applicable to the facts of the case, and not mere general rules of policy which may or may not be wise and proper in the conduct of a particular business. *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63.

The following instruction was also asked and refused : —

“ Any evidence of the plaintiff tending to show a specific act of incompetence on the part of Stice, conductor, if there is any such evidence, is only admissible for the purpose of showing that the company had not exercised due care, prudence, and caution in the employment of, or retaining in service of, a careful, prudent, and skilful conductor, and to bring notice to the defendant of incompetence.”

Instruction as to evidence of specific acts to show incompetency.

While a specific act or mistake will not necessarily establish incompetence, as has already been remarked, a single act may be of such a character, and may involve such consequences, as, with the surrounding circumstances, to indicate want of qualification on the part of the actor. Such acts are usually resorted to by witnesses as a basis for an opinion as to the qualification of the person whose competency for a particular service is in question.

In such cases the acts, with the accompanying evidence, are proper to be considered by the jury. *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, *supra*.

The court also refused to charge that “ specific acts of negligence are not competent to show that the conductor, Stice, was guilty of producing the collision, as charged in the complaint, if it were on a different occasion.”

While the foregoing is undoubtedly a correct statement of the law when considered in connection with evidence to which it is applicable, the refusal of the court in the present case is not available to the appellant. The appellant’s theory, and that of its witnesses, was, that the collision was attributable, not to the incompetence of Stice, but to his neglect. The appellant admitted the negligence of Stice, but insisted that he was not incompetent. There was no evidence to which the instruction was applicable. We have discovered no error justifying a reversal.

The judgment is affirmed, with costs.

Duty of Company as to Employment and Retention of Servants. — See, generally, *Texas & N. O. R. Co. v. Berry*, 31 Am. & Eng. R. R. Cas. 147; *Neilson v. Kansas City, etc., R. Co.*, 28 Ib. 386; *Alexander v. Louisville & N. R. Co.*, 25 Am. & Eng. R. R. Cas. 458; *U. S. Rolling-stock Co. v. Wilder*, and note, 25 Ib. 414-420; *Dallas v. Gulf, etc., R. Co.*, 21 Ib. 575; *Wabash R. Co. v. McDaniels*, 11 Ib. 158; *Texas, etc., R. Co. v. Whitmore*, 11 Ib. 195; *Atchison, etc., R. Co. v. Moore*, 11 Ib. 243; *Ransier v. Minnesota, etc., R. Co.*, 11 Ib. 647; *Mann v. Delaware & H. C. Co.*, 12 Ib. 199; *East Tenn., etc., R. Co. v. Gurley*, 17 Ib. 568; *Mares v. Northern Pac. R. Co.*, 17 Ib. 620; *Chicago, etc., R. Co. v. Huffman*, 17 Ib. 625; *Hilts v. Chicago, etc., R. Co.*, 17 Ib. 628; *Corson v. Maine Cent. R. Co.*, 17 Ib. 634; *Kersey v. Kansas City, etc., R. Co.*, 17 Ib. 638; *Murphy v. St. Louis, etc., R. Co.*, 2 Ib. 83; *Smith v. Potter*, 2 Ib. 140; *Mich. Cent. R. Co. v. Gilbert*, 2 Ib. 630; *Ross v. Chicago, etc., R. Co.*, 2 Ib. 640; *Little Rock, etc., R. Co. v. Duffey*, 4 Ib. 637; *Ohio, etc., R. Co. v. Collarn*, 5 Ib. 554; *Harvey v. N. Y. Cent. R. Co.*, 8 Ib. 515; *Houston, etc., R. Co. v. Myers*, 8 Ib. 114; *Beems v. Chicago, etc., R. Co.*, 10 Ib. 658.

1. Incompetency of Fellow-Servants. — General Rule of the Master's Liability for Injuries to a Servant resulting from. — According to the great weight of authority, where an employer uses due care and diligence in selecting and retaining only competent and trustworthy servants, he is not, in the absence of statutory provisions, answerable to one of them for injuries resulting from the negligence of a fellow-servant in the same service. This rule is almost axiomatic, and scarcely needs the citation of authorities. See, however, *Fones v. Phillips*, 39 Ark. 17; *Walker v. Bolling*, 22 Ala. 294; *Shields v. Yonge*, 15 Ga. 394; *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244; *Chicago E. I. R. Co. v. Geary*, 110 Ill. 383; *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill. 401; *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336; *Honner v. Illinois Central R. Co.*, 15 Ill. 550; *Illinois Central R. Co. v. Cox*, 21 Ill. 20; *Sullivan v. Toledo, W. & W. R. Co.*, 58 Ind. 26; *Slattery v. Toledo & W. R. Co.*, 23 Ind. 81; *Benn v. Null*, 65 Ia. 407; *Foley v. Chicago, R. I. & P. R. Co.*, 64 Ia. 664; *Malone v. Burlington, C. R. & N. R. Co.*, 65 Ia. 417; s. c., 17 Am. & Eng. R. R. Cas. 444; *Luce v. St. Paul, M. & O.*, 67 Ia. 75; *Sullivan v. Mississippi & M. R. Co.*, 11 Ia. 421; *Hugh v. New Orleans & P. R. Co.*, 6 La. An. 495; *McDermott v. Boston*, 133 Mass. 349; *Smith v. Lowell Manufacturing Company*, 124 Mass. 114; *King v. Boston & W. R. Co.*, 9 Cush. (Mass.) 112; *Carle v. Bangor & P. C. R. Co.*, 43 Me. 269; *Beaulieu v. Portland Co.*, 48 Me. 291; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411; *Cumberland & P. R. Co. v. Moran*, 44 Md. 283; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Michigan Central R. Co. v. Leahey*, 10 Mich. 193; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 410; *Brown v. Winona & St. P. Co.*, 27 Minn. 162; *Foster v. Minnesota Cent. R. Co.*, 14 Minn. 360; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Lee v. Detroit Bridge & Iron Co.*, 62 Mo. 565; *Brothers v. Cartter*, 52 Mo. 372; *Howd v. Mississippi Cent. R. Co.*, 50 Miss. 178; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637; *Hardy v. Carolina Cent. R. Co.*, 76 N. Car. 5; *Cowles v. Richmond & D. R. Co.*, 84 N. Car. 309; *Pouton v. Wilmington & W. R. Co.*, 6 Jones (N. Car.), 245; *McAndrews v. Burns*, 39 N. J. L. 117; *Anderson v. New Jersey Steamboat Co.*, 7 Robt. (N. Y.) 611; *Karl v. Maillard*, 3 Bosw. (N. Y.) 591; *Brown v. Maxwell*, 6 Hill (N. Y.), 592; *Wright v. New York Central R. Co.*, 25 N. Y. 562; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Lanning v. New York Cent. R. Co.*, 49 N. Y. 521; *Coulter v. Board of Education*, 4 Hun (N. Y.), 569; *Willis v. Oregon Ry. & Nav. Co.*, 11 Oreg. 257; s. c., 17 Am. & Eng. R. R. Cas. 539; *Pittsburgh, F. W. & C. R. Co. v. Devinney*, 17 Ohio St. 197; *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Weger v. Penn. R. Co.*, 55 Pa. St. 460; *Strange v. McCormick*, 1 Phila. (Pa.) 156; *Caldwell v. Brown*, 53 Pa. St. 453; *Fox v. Sanford*, 4 Sneed (Tenn.), 36; *Moseley v. Chamberlain*, 18 Wis. 700; *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 238; *Hoth v. Peters*, 55 Wis. 405; *Heine v. Chicago & N. W.*

R. Co., 58 Wis. 525; *Herlbert v. Northern Pac. R. Co.* (Dak.), 13 N. W. Rep. 349; *Hogan v. Central Pac. R. Co.*, 49 Cal. 129; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Dillon v. Union Pac. R. Co.*, 3 Dill. (U. S.) 319; *Kelley v. Belcher Silver Mining Co.*, 3 Sawy. (U. S.) 500; *The Harold*, 21 Fed. Rep. 428; *Johnson v. Armour*, 18 Fed. Rep. 490; *Gilmore v. Northern Pac. R. Co.*, 18 Fed. Rep. 866; s. c., 15 Am. & Eng. R. R. Cas. 304; *Buckley v. Gould & Curry Silver Min. Co.*, 14 Fed. Rep. 833; *Gravelle v. Minneapolis & St. L. R. Co.*, 10 Fed. Rep. 711; s. c., 6 Am. & Eng. Corp. Cas. 612; *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. Rep. 87; *Compare Louisville & N. R. Co. v. Robinson*, 4 Bush (Ky.), 507.

"If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of the want of requisite skill to discharge the duties which he is employed to perform, or for any other cause is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant." 2 *Thomp. Neg.* 974, approved in *Ohio & M. R. Co. v. Col-larn*, 73 Ind. 261; s. c., 5 Am. & Eng. R. R. Cas. 554. To same effect see *Chicago & G. E. R. Co. v. Harvey*, 28 Ind. 28; *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26; *Chicago & N. W. R. Co. v. Swett*, 45 Ill. 197; *Dow v. Kansas Pac. R. Co.*, 8 Kan. 642; *Union Pac. R. Co. v. Young*, 19 Kan. 488; *Kansas Pac. R. Co. v. Salmon*, 14 Kan. 512; *Colton v. Richards*, 123 Mass. 484; *Cayzer v. Taylor*, 10 Gray (Mass.), 274; *Farwell v. Boston & W. R. Co.*, 4 Met. (Mass.) 49; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567; *Moss v. Pacific R. Co.*, 49 Mo. 167; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521. See also cases cited *supra*.

2. Degree of Care required in the Selection of Servants. — A master does not warrant the competency of his servants, but he contracts to use all ordinary care and diligence in their selection and retention. *Union Pac. R. Co. v. Millikin*, 8 Kan. 647; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Sizer v. Syracuse, B. & N. Y. R. Co.*, 7 Lans. (N. Y.) 67; *Banlec v. N. Y. & H. R. Co.*, 59 N. Y. 356; *Tarrant v. Webb*, 18 C. B. 797. In *Wabash R. Co. v. McDaniels*, 107 U. S. 454, s. c., 11 Am. & Eng. R. R. Cas. 158, the question was fully discussed, and the correct rule stated. "The discussion in the adjudged cases discloses no serious conflict in the courts as to the general rule, but only as to the words to be used in defining the precise nature and degree of care to be observed by the employer. The decisions, with few exceptions not important to be mentioned, are to the effect that the corporation must exercise ordinary care. But according to the best-considered adjudications, and upon the clearest grounds of necessity and good faith, ordinary care in the selection of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as, in view of the consequences that may result from negligence on the part of employer, is fairly commensurate with the perils or danger likely to be encountered. . . . These observations meet in part the suggestion made by counsel, that ordinary care in the employment and retention of railroad employees means only that degree of diligence which is customary or is sanctioned by the general practice and usage which obtain among those intrusted with the management and control of railroad property and railroad employees. To this view we cannot give our assent. There are general expressions in adjudged cases which apparently sustain the position taken by counsel. But the reasoning upon which those cases are based is not satisfactory, nor, as we think, consistent with that good faith which at all times

should characterize the intercourse between officers of railroad corporations and their employees. It should not be presumed that the employee sought or accepted service upon the implied understanding that they would exercise less care than that which prudent and humane managers of railroads ought to observe. To charge a brakeman, when entering the service of a railroad company, with knowledge of the degree of care generally or usually observed by agents of railroad corporations in the selection and retention of telegraphic operators along the line traversed by trains of cars — a branch of the company's service of which he can have little knowledge, and with the employee specially engaged therein he can ordinarily have little intercourse — is unwarranted by common experience. And to say, as matter of law, that a railroad corporation discharged its obligation to an employee — in respect of the fitness of co-employees, whose negligence has caused him to be injured — by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far toward relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations, in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive, upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law." See also *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 427; s. c., 17 Am. & Eng. R. R. Cas. 628.

The conductor of a train was injured in consequence of the mismanagement of the locomotive by a fireman who had been placed in charge of the engine by the agents of the company. In an action for damages against the company, it was held that it was responsible, on the ground that its agents were negligent or unmindful of their duty in employing competent and skilful servants in the execution of the company's business. *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567; s. c., 4 Am. Rep. 353.

In *Ill. Cent. R. Co. v. Jewell*, 46 Ill. 99, it appeared that the defendant employed an engineer who was given to fast running, addicted to drinking, and inattentive to his watch and time-card. It was held that the defendant was bound to know the qualifications of its employees in such responsible positions, and that, where a brakeman was thrown from a car and killed by reason of the engineer's incompetency, his representatives could recover for his death. Doubtless this case states the rule of responsibility too strictly. See cases *supra*.

Where a railroad company, whose road formed a junction with another road, intrusted a person employed and paid by such other road with the business of attending to trains at such junction, and such person was incompetent, whereby death resulted to one of its engineers, it was held liable to his representatives in damages. *Taylor v. West. Pac. R. Co.*, 45 Cal. 323.

In *Wabash R. Co. v. McDaniels*, 107 U. S. 454, s. c., 11 Am. & Eng. R. R. Cas. 158, a brakeman sought damages for an injury alleged to have resulted from the employment by the company of an incompetent train-despatcher. It appears that the latter was a bright, industrious boy seventeen years of age, but that his whole knowledge of telegraphy had been acquired during one year's service as a messenger-boy, during which he received instruction in the art; and that he had not been considered competent for some parts of the business. A judgment for damages was sustained.

In an action against a railroad company by an engineer for an injury caused by the negligence of a freight conductor, evidence that he was put on the list of conductors some eight months before the accident, after having been employed as brakeman for a somewhat longer period, and that he had

once by mistake carried a passenger by his stopping-place, and had for that reason spoken disparagingly of himself to his employer, where it appears that he had, nevertheless, maintained a good standing, and that no fault had been found with him except by himself for this single blunder, does not make out a case of incompetence. *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510.

In *Texas & N. O. R. Co. v. Berry*, 5 S. W. Rep. (Tex.) 817, the personal representatives of a brakeman sought damages, on the ground that his death had been caused by the incompetence of the engineer. The latter had been a fireman on other roads, and also on the defendant's road for a year previous to his promotion as engineer, and had borne a good reputation as to his knowledge of his work and the performance of his duty. It was held that the defendant was not guilty of negligence in employing him in the latter capacity.

Promoting to the post of conductor a person who has served seven years as car coupler and shover, the duties of which place made him acquainted with the modes of making up trains, the dangers incurred by those employed in the work, and by others, and the precautions necessary to guard against accidents, is not negligence nor evidence of negligence; it not appearing that such person had ever shown himself incompetent or unfaithful prior to the happening of the injury sued for. *Haskin v. N. Y. Cent. & H. R. R. Co.*, 65 Barb. (N. Y.) 129.

Gibson v. North. Cent. R. Co., 22 Hun (N. Y.), 289, was an action against a railroad company by an employee for an injury resulting from a defective car-bumper. It was alleged that the car-inspector was negligent in not having sent the car to the shops for repairs. It appeared that the inspector was sober and intelligent, that he had no knowledge of machinery, except that obtained by working one or two years in the defendant's carpenter shop, bolting, putting in brasses and boxes, and assisting in the shop. The court held that the defendant was not negligent in appointing him a car-inspector.

3. Negligence in the Retention of Servants.—Although an employer may have used due care and diligence in selecting his servants, if subsequently he obtains knowledge of a servant's incompetence or unfitness for his position, and retains him in his employment, he is liable to a fellow-servant for any injury resulting from such unfitness. But the employer must have notice of the unfitness of the servant.

"Good character and proper qualifications once possessed may be presumed to continue, and the master may rely on that presumption until notice of a change." *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Chapman v. Erie R. Co.*, 55 N. Y. 579.

But though the employer had no actual notice of the incompetence of the servant, if it was notorious and of such a character that with proper care he would have known of it, he will be liable for an injury to another servant resulting from such incompetence. *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58. This rule has been applied frequently where the incompetent servant has been addicted to the excessive use of intoxicants. *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233; s. c., 13 Allen, 433; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 17 Am. & Eng. R. R. Cas. 628; *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58. *Contra*, *Chapman v. Erie R. Co.*, 55 N. Y. 579.

On the other hand, "if a person knowing the hazards of his employment as it is conducted, voluntarily continues therein without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the wilful act of the master." *Stafford v. C., B. & Q. R. Co.*, 114 Ill. 244; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Kansas Pac. R. Co.*

v. Peavy, 34 Kan. 472; s. c., 29 Kan. 169; s. c., 11 Am. & Eng. R. R. Cas. 260; *Dillon v. Union Pac. R. Co.*, 3 Dill. (U. S.) 319.

Still less is a servant entitled to damages for injuries resulting from the incompetence of a fellow-servant when he knew of such incompetence and made no complaint about it to his employer. *Hatt v. Nay*, 144 Mass. 186; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75; *Wright v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 80; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521.

The fact that an engineer remained at his post and attempted to check the speed of his train when he might have escaped injury by jumping, was held not to prevent the recovery of damages by his personal representatives. *Penna. R. Co. v. Roney*, 89 Ind. 453; s. c., 12 Am. & Eng. R. R. Cas. 223.

A servant is warranted in assuming that the master has used reasonable care and prudence in the selection of those already employed in the same branch of service; and until notice to the contrary is brought home to the employee, he may safely act upon that hypothesis.

"All that the law demands of one thus employed (a fellow-servant) is, that he keep his eyes open to what is passing before him, and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow-servants; and if from either of these sources of information he finds one of them, from incompetency or other cause, renders his own position extra hazardous, it is his duty to notify the master; and if the latter refuses to discharge the incompetent or otherwise unfit fellow-servant, the complaining servant will have no other alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned." *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 100; s. c., 25 Am. & Eng. R. R. Cas. 414.

According to some cases it would seem, that, if the injured servant had the same means of knowing the incompetence of his fellow-servant as the master possessed, he cannot recover for an injury resulting from such incompetence. Especially would this rule obtain in cases where the injured servant held an intermediate position between the employer and the incompetent servant. *Davis v. Detroit & Mil. R. Co.*, 20 Mich. 105; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75; *Haskin v. New York Cent. & H. R. R. Co.*, 65 Barb. (N. Y.) 129.

Under the statutory rules governing English collieries, the rope by which pitmen descend should be tested every day. The requirement was habitually disregarded, to the knowledge of a mine-owner, by those whose duty it was to test the rope. A pitman who knew of the rule and its habitual violation, refused, though advised by the banksmen, to examine the rope (which had been injured the night before, and not since tested) before descending by it into the pit. The rope broke, and the pitman was killed. It was considered by the court, that, had the pitman been guilty of no negligence, his representative might have recovered damages for his death, but that, having been guilty of contributory negligence, they could not. *Senior v. Ward*, 1 El. & El. 385; s. c., 5 Jur. (U. S.) 172; 28 L. J. (Q. B.) 137; 7 Week. Rep. 261.

In *Kean v. Detroit Copper & Brass Rolling Mills* (Mich.), 33 N. W. Rep. 395, it appeared that a foreman under whose directions the plaintiff claimed to have been injured, was in the habit of getting intoxicated, and that the master knew of such habit. The court said, "There can be no question, I apprehend, at this late day, but that it must be regarded as negligence and a want of ordinary care in any of our large manufacturing institutions to place men who are accustomed to the habitual use to excess of intoxicating liquor in charge of business requiring the control and direction of persons operating dangerous machinery, and that for any injury arising to the employed under the charge of an intoxicated foreman, arising from such cause, when the company has knowledge of such intemperate habits, it must and should make reasonable compensation." The case seems to have gone

against the plaintiff, because the danger was as apparent to him as to the foreman, and it was said that he should not have obeyed the order in question.

Where a servant has knowledge of the incompetency of a fellow-servant, and, continuing in the master's employment, is injured by reason of such incompetence, the fact that he had made complaint, and was told the incompetent servant would be changed, is to be considered in arriving at a conclusion as to whether the injured servant was guilty of contributory negligence. *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521.

In *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100, s. c., 25 Am. & Eng. R. R. Cas. 414, the plaintiff sued for the loss of a hand, resulting from the alleged negligence of a fellow-servant. The court said, "The defendant, it will be perceived, is charged with negligence in the selection and hiring of an incompetent engineer, and also in suffering and permitting such incompetent engineer to manage, control, and operate its cars and engine. . . . Whatever may be said in respect to the first branch of the subject, the decided weight of evidence shows that Guernsey, the defendant's engineer, was incompetent, and that the defendant had at the time of and during plaintiff's employment notice of this fact. Guernsey was first employed by the defendant in the capacity of truck-repairer, and was promoted from that position to the more responsible one of engineer upon his own recommendation. He entered the defendant's service in May or June, 1880, and the attention of the company was frequently called to his incompetency. It is true, Cary, foreman, and Stagg, superintendent of the company, thought him competent for the position he occupied. As they were probably responsible to the company both for his employment and retention, it is not a matter of surprise that they should so consider him. So far as Cary is concerned, he might safely say this, for he evidently thought his position required little or no skill; for, in answer to the inquiry if it did not require as much skill to run the company's engine as any other, he says, 'No, sir, I will say that it does not require any but an ordinary man. A very ordinary man can do it in our yard. . . . A man that is competent to keep the water up and keep his pumps going can do our work.' Without dwelling upon the facts, we will add, in general terms, that the witnesses for the plaintiff make out a strong case of inexcusable negligence against the defendant in retaining Guernsey as engineer of the company."

In *Harper v. Ind. & St. L. R. Co.*, 47 Mo. 567, a conductor of a train was injured by reason of the incompetency of a fireman whom the engineer permitted to manage the engine. It was held, that if the company knew of such a practice on the part of the engineers on its road, and did not forbid it, and the conductor did not know that the engine was in charge of the fireman at the time, the company was liable for damages for the injury sustained.

In *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261, s. c., 5 Am. & Eng. R. R. Cas. 554, the plaintiff was a track-repairer, and had been injured by an engine run by a fireman. It was held that the defendant was liable, although it had given orders to its engineers not to permit firemen to control its engines, because, having had notice of disobedience of such orders, it retained the disobedient engineers in its employ.

Sizer v. Syracuse, B. & N. Y. R. Co., 7 Lans. (N. Y.) 67, was an action by an employee whose business it was to make up freight-trains for an injury occasioned by the incompetency of an engineer. The court said, "The company owe it to those engaged in coupling and uncoupling cars to exercise the highest care in the selection of engineers to manage engines used in making up trains. Men of strictly temperate habits, men who are careful, cool, discreet, and obedient, only should be employed; and if men wanting these qualities are knowingly employed, and injury results therefrom, the company is as liable to the employee injured as if the engineer was unskilful." It appeared that the engineer in the case was habitually disobedient to orders, and was not a regular engineer, of which facts the superintendent had knowledge; and the company was held liable for damages.

4. Burden of Proof. — Where it is alleged that a master was guilty of negligence in selecting or retaining an incompetent servant, the burden is on the plaintiff to prove it. *Stafford v. C., B. & Q. R. Co.*, 114 Ill. 244; *Columbus, C. & I. C. R. Co. v. Troesch*, 68 Ill. 545; *Chicago & E. I. R. Co. v. Geary*, 110 Ill. 383; *Summerhays v. Kansas Pac. R. Co.*, 2 Colo. 484; *Murphy v. St. Louis & I. M. R. Co.*, 71 Mo. 202; s. c., 2 Am. & Eng. R.R. Cas. 83; *Catlin v. Mich. Cent. R. Co.*, 33 N. W. Rep. (Mich.) 515; *Hilts v. Chicago & G. T. R. Co.*, 55 Mich. 437; s. c., 7 Am. & Eng. R. R. Cas. 628; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411.

5. Character of Evidence. — Evidence of general reputation is admissible to prove the unfitness of a fellow-servant. And ignorance of such general reputation on the part of the master is itself negligence in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. *Davis v. Detroit & Mil. R. Co.*, 20 Mich. 105. See also *Gilman v. Eastern R. Co.*, 13 Allen (Mass.), 433; *Hatt v. Nay*, 144 Mass. 186; and cases cited on habitual intoxication, *supra*.

In *Frazier v. Penna. R. Co.*, 38 Pa. St. 105, the court refused to permit the introduction of specific acts of negligence on the part of a servant alleged to be incompetent, for the purpose of charging the defendant company with knowledge of the servant's incompetence. See also *Hatt v. Nay*, 144 Mass. 186; *contra*, *Pittsburgh, F. W. & C. R. Co. v. Ruby*, 38 Ind. 294.

While evidence of single acts may be admissible to prove the incompetence of a servant, such evidence is not necessarily conclusive. *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 565; *Cooper v. Milwaukee & P. C. R. Co.*, 23 Wis. 668; *Couch v. Watson Coal Co.*, 46 Ia. 17.

It is believed that *Baules v. New York & H. R. Co.*, 59 N. Y. 356, contains a statement of the correct rule: "When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employees whose acts and omissions of duty are the subject of investigation have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the particular occasion which is the subject of inquiry. Where character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation, or want of adaptation, to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described; and the actual qualities, the true characteristics, of individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility, are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent, or careless man. He would be held liable to the fellow-servants of the employee for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more would he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him, and which might expose his fellow-servants and others to peril and harm. . . . An individual who by years of faithful service has shown himself trustworthy, vigilant, and competent, is not disqualified for further employment, and proved

either incompetent, or careless and not trustworthy, by a single mistake or act of forgetfulness, and omission to exercise the highest degree of caution and presence of mind. The fact would only show, what must be true of every human being, that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case, as to all employees of corporations, until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an individual to be an improper and unfit person for a position of trust or any particular service, as when such act is intentional, and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, *per se*, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts, and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a road-crossing, but such fact would not tend to prove him a careless and negligent servant of the company. The company is only charged with the duty of employing those who have acquired a good character in respect to the qualifications called for by the particular service, and no one would say that a good character acquired by long service was destroyed or seriously impaired by a single involuntary and unintentional fault. *Murphy v. Pollock*, 15 Irish C. L. 224. But this appeal does not necessarily depend upon the correctness of this view of the effect to be given to a single instance of neglect. All that the corporation defendant was bound to do, after the occurrence, was to inquire into and ascertain the facts, and act in the discharge or retention of the switchman, with reference to the facts as ascertained, as reasonable prudence and care would dictate; and if such care and caution were exercised, the company is not liable, although its general agent erred in judgment in retaining the switchman in the same service. Ordinary care and reasonable exercise of discretion and judgment are all that is necessary to absolve the corporation from the charge of neglect of duty in such a case."

In a suit for damages for personal injuries brought by a brakeman against a railroad company, in which the unskilfulness and incompetency of the engineer were charged as causes of the injury, evidence of the declarations of the engineer to the plaintiff to the effect that he would as soon run over him as not, was held admissible to prove that the company did not use proper care in selecting the engineer, if supported by other satisfactory evidence. *Houston & T. C. R. Co. v. Willie*, 43 Tex. 318; s. c., 5 Am. & Eng. R. R. Cas. 551.

Evidence that an engineer alleged to have been incompetent was discharged after the accident for which damages are sought occurred, and that he has since been guilty of similar acts of negligence, is not admissible to prove that the employer was guilty of negligence in employing him. *Couch v. Watson Coal Co.*, 46 Ia. 17.

6. Acts of General Agents.— Though a master has employed skilful and competent general servants, agents, or superintendents, he is liable for injuries received by inferior servants from the incompetency of other inferior servants employed by such general servants, agents, or superintendents without due care or inquiry, or retained by them after knowledge of their incompetency. *Lanning v. N. Y. Cent. R. Co.*, 49 N. Y. 521; *Baulec v. New York & H. R. Co.*, 59 N. Y. 356; *Pittsburgh, F. W. & C. R. Co. v. Ruby*, 38 Ind. 294; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.), 433; *Frazier v. Penna. R. Co.*, 36 Pa. St. 104.

Notice of the incompetency of a fellow-servant to one whose duty is confined to notifying train-men when they are expected to be on duty, is not notice to a railroad corporation. *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510.

7. Pleadings.— "Where . . . the servant shows in his complaint that the injury for which he sues the master was caused or occasioned by the neg'i-

gence of his fellow-servant, he must also allege in his complaint either that the master had not exercised ordinary care and prudence in the employment of such fellow-servant, or that it had retained him in its service after it had received notice that he was negligent in the discharge of the duties of his position. This much must be stated in relation to the negligence of the master; and with respect to himself, in such a case, the injured servant must aver in his complaint, that, at the time he entered the master's service, he had no knowledge of the negligent habits of the fellow-servant through whose negligence he has alleged that he was injured." *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1; s. c., 28 Am. & Eng. R. R. Cas. 323. See also *Ind., B. & W. R. Co. v. Dailey*, 110 Ind. 75.

Undoubtedly the negligence of an employer in selecting or retaining incompetent servants must be distinctly charged. *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Lawler v. Androscoggin R. Co.*, 62 Me. 463. But it would seem that the want of knowledge on the part of an injured servant of his fellow-servant's incompetence should be presumed. *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 100; s. c., 25 Am. & Eng. R. R. Cas. 414.

8. Question for Jury.—The incompetency of a fellow-servant, and the master's negligence in employing or retaining an incompetent servant, are questions of fact for the jury. *Gilman v. Eastern R. Co.*, 10 Allen (Mass.), 233.

EWALD

v.

CHICAGO & NORTH-WESTERN R. CO.

(*Wisconsin Supreme Court, Jan., 10, 1888.*)

When Servant is in the Employment of the Company.—A wiper employed in a railroad company's round-house is in the employment of the company while passing through its yards on his way to work.

Train-Men and Engine Wiper are Fellow-Servants.—An engine wiper employed in round-house is a fellow-servant of the men operating a train, and cannot recover for any injury which he may receive through their negligence.

APPEAL from Milwaukee County Court; J. E. Mann, Judge.

This was an action brought by August Ewald against the Chicago & North-western Railway Company for injuries. The facts appear sufficiently in the opinion. On demurrer, judgment was rendered for defendant, and plaintiff appeals.

Austin, Runkel, & Austin for appellant.

Jenkins, Winkler, Fish, & Smith for respondent.

ORTON, J.—The following portions of the complaint sufficiently raises the questions involved: "That this plaintiff was, at the time hereinafter mentioned, employed by said defendant as a laborer, and his duty was to attend to the wiping and cleaning of locomotives belonging to said defendant in the night-time, and after they were removed from the tracks, and into the round-house;" "that he had nothing what-

Facts.

ever to do with the operation of said railroad or any of its rolling stock, and was not employed in any capacity upon any of the trains of said company, but his employment was confined exclusively to cleaning engines after they were put into said round-house;" "that on the fifth day of February, 1886, at about six o'clock in the evening of that day, this plaintiff was proceeding, with due care and caution, through the yard of the defendant, to commence his night's work and labor in the round-house of said company; that he was walking in the usual and beaten path, that had been worn and used by himself and others employed in said round-house for a long time prior to said last-mentioned date, in going to and from his and their work; that, in order to reach said round-house, it was necessary for him to go upon said pathway, and to cross the track of said defendant company in its said yards; that, as he approached said track, he noticed that it was occupied by a number of freight-cars, and that said cars were uncoupled and separated, and a space left between said cars where the aforesaid beaten path crossed said railway track." The complaint then substantially charges that the defendant well knew that such opening between the cars at said path was accustomed to be kept open for the use of its employees, going from and coming to said round-house, and that the plaintiff had long known of such custom; that as he approached said track he looked up and down, and listened, and saw no engine, and no person at the crossing having charge of said train, and heard no noise or signal or any thing to indicate that the cars were to be moved, and that he thereupon stepped in between said cars on said pathway, and, before he could get across, the defendant negligently and carelessly caused said cars to be jammed together by one of its locomotives, without warning by bell or whistle, and the plaintiff's arm was caught between the bumpers to said cars, and he was dragged by the movement of the train about sixty feet, and greatly injured. To this complaint the defendant interposed a general demurrer, that it stated no cause of action; and the demurrer was sustained, presumably upon the ground that the plaintiff's injury was caused by the negligence of his fellow-servants or co-employees.

It would seem that in the county court the only question was, whether the plaintiff, as a wiper of engines in the round-house, was a fellow-servant of the engineer or conductor of the freight-train, or those having charge of the same, so that he could not recover by reason of their negligence. But in this court the main question seemed to be, that at the time of the injury the plaintiff was not an employee of the defendant, because not then actually employed in the service of the company, but was merely

Plaintiff was engaged in defendant's employment at the time he was injured.

going to the round-house, the place of such employment or service. This question would seem to be foreclosed by the allegations of the complaint. It is alleged that, at the time thereafter mentioned, viz., at about six o'clock on the fifth day of February, 1886, the time when he was injured, the plaintiff *was employed* by the defendant as a laborer to attend to the wiping and cleaning of locomotives, etc. Then, again, the plaintiff bases his right to be on that pathway, on the grounds of the company, and to pass safely through the opening of the cars thereon, and to have it kept open for him, solely upon the fact that he was at that time an employee of the company, with others who were accustomed to use the same, going from and returning to their work in the round-house. It is not alleged that the company owed the plaintiff any duty to keep open for him that pathway, or to look out for his safety thereon, *except* as he was an *employee* of the company, and in its service at the time. Otherwise, he was a stranger, intruder, and trespasser upon the grounds of the company, and the company was not charged with any duty towards him or such persons at that place. It follows that, if the company was charged with any liability to the plaintiff for the negligence of its servants and employees, it is because he was a co-employee of the company or fellow-servant with them. It is the *gravamen* of the complaint, that, by custom having the force of contract, the company kept open, and was bound to keep open, that pathway between the cars for the use and convenience of the plaintiff and other employees of the company whose business it was to do the wiping and cleaning of the engines in that round-house of the company, in going away from or returning to their said work in the round-house. It is not charged in the complaint that, by custom or usage, that pathway was or was to be kept open for the public or strangers, by the company, as a public or private way, by dedication or consent, for their use or convenience. It was solely for the use of the plaintiff as an employee or servant, and for other employees or servants of the company whose duties were performed in that round-house. By the complaint, it was a means of egress or ingress from or to that round-house, provided by the company for the exclusive use of the plaintiff and his co-employees, as useful and essential to them, as a door or gateway to the round-house itself. From these facts the duty of the company to keep open this pathway for the plaintiff, and assure the safe use thereof to the plaintiff, is educed. The company, and those having charge of the train at the time, were aware of this custom, and had good reason to suppose that this pathway or opening was being used at the time by the plaintiff, and was left open for him on his way to the round-house, and hence their duty to look out for his safety

therein. We therefore agree with the plaintiff, that he was, at the time he was injured in that pathway, in the opening between the cars, in the employment of the company.

This might well end the case so far as the question whether he was then an employee of the company is concerned ; and yet the learned counsel on both sides saw fit to discuss the question, whether the plaintiff was really an employee at the time, and through courtesy we pass upon it as a question of law, although in some cases this question is made one of fact for the jury. The facts being admitted by the demurrer, it may as well be treated as a question of law. We will not enlarge the question even to the extent the argument of the learned counsel seemed to carry it, but confine it strictly to this case on its facts. As to what may be the law when an employee of a railway company is not actually employed, or at any intervals of actual labor, or going to or from his labor his own way, and independently of the company, or under other circumstances, is immaterial to this case. The authorities may be in great conflict upon that question, but we are not aware that they are in conflict upon the question presented by the facts of this case. Here we have a private pathway over the grounds of the company, granted and allowed to the plaintiff and other employees of the company who worked in the round-house, by usage, custom, and consent, for their ingress and egress to and from their work, kept open across the track of the road, and which had been worn and used by himself and others for a long time prior to the injury, and that, in order to reach the round-house, it was necessary for him to go upon said pathway, and to cross the track of the company at that place. It was the means, and only means, of entrance and exit to and from their work furnished by the company, and the plaintiff and others had a right to its free and uninterrupted use as they always had ; and it was because they were the employees of the company in the round-house that they had such right and privilege. It was an essential part and ingredient of the plaintiff's contract of employment, and incidental to it, as much as any means and facilities for his labor in the round-house itself furnished by the company. The plaintiff, therefore, while enjoying such privilege and facility, or while passing along that pathway, and between the opening of the cars, was an employee and servant of the company, as much as while actually laboring for the company in the round-house, and as much within his contract of employment. On the other hand, there was, by virtue of the same contract, a corresponding duty of the company to keep that passage-way open for the plaintiff, for he had a right to be there as an employee of the company working in the round-house. If the company violated that duty, to the plaintiff's

injury, by its own act or primary negligence, its liability to respond in damages is absolute and unquestionable; but if the plaintiff has this benefit or advantage by reason of his relation to the company as an employee, he must also suffer the disadvantage, if it be such, of being remediless against the company if his injury in that relation was caused by the negligence of his co-employees or fellow-servants. But this will be considered hereafter.

Our present concern is, was he, when injured, an employee of the company? The peculiar facts of this case which make him such appear to involve precisely the same principle of that class of cases where the plaintiff was being carried on his way from and to his place of labor by the railroad company, by consent, custom, or contract, and was injured by the negligence of other employees of the company. This carriage of the plaintiff was the means, facility, and advantage to which he was entitled by reason of his being an employee or servant, which entered into and became a part of his contract of employment, or were incidental and necessary to it.

Same. Authorities reviewed.

In *Gilman v. Railroad Corp.*, 10 Allen, 233, the plaintiff was a car-repairer, and was being carried on the cars of the company to his home at night, a distance of about four miles, free of charge, by the contract. He was injured on the way by the carelessness of a switchman of the company. It was held, not only that he was an employee of the company at the time, but a co-employee of the switchman, and could not recover. In *Gillshannon v. Railroad Corp.*, 10 Cush. 228, the plaintiff was a laborer repairing the road-bed several miles from his home, and was being carried on a gravel-train to his work free, and by the mere consent of the company, and was injured on his way by the carelessness of those having charge of the train. Dewey, J., says, in the opinion, "If the plaintiff was, by the contract of service, to be carried to the place of his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If it be not properly inferrible from the evidence that the *contract* between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a *permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his service and labor, and is equally connected with it and the relation of master and servant*, and therefore furnishes no ground for maintaining this action." This expresses the exact principle of this case. The keeping open of this pathway between the cars was a permissive privilege (established by custom in this case) granted to the plaintiff, of which he availed himself, to facilitate

his labor and service, and is connected with it and the relation of master and servant. In *Seaver v. Railroad Co.*, 14 Gray, 466, a carpenter employed to repair the fences, bridges, etc., of the company, was carried to his work on the train, and was injured by the negligence of the engineer, or of those whose duty it was to inspect the axles of the cars. It was held that he was a servant of the company, and a fellow-servant of the engineer and the others, and could not recover. The case of *Ryan v. Railroad Co.*, 23 Pa. St. 384, is closely in point. The plaintiff was a common laborer employed in digging and filling cars with gravel, etc. He lived about four miles distant from his principal work, and it was *usual* for him and his fellow-workmen to ride on a gravel-train to and from their work; and, while being so carried to his work, he was injured by the carelessness of those in management of the train. It was held that he was a mere servant of the company, with the privilege of riding, as a part of his business, in the gravel-train, which was one of the instruments of his work, and that he sued in his true relation, not as a passenger, but as a servant, and was injured by the carelessness of his fellow-servants, and could not recover. In *Le Blanche v. Railway Co.*, L. R. 1 C. P. 289, the plaintiff was a laborer with others to assist in loading a pick-up train, and it was a part of their contract of service that they should be carried to and from their work. After his work was done for the day, he was being carried to the place of his residence, and on the way was injured by the negligence of the managers of the train; and it was held that he was still a servant, and could not recover for the negligence of his fellow-servants: and the case of *Gillshannon v. Railroad Corp.*, *supra*, is cited as authority by Field, queen's counsel. The case of *Higgins v. Railroad Co.*, 36 Mo. 418, is an extreme case in favor of this principle. The plaintiff had been employed as a brakeman, but had ceased work for a considerable time, but had not been paid off. He hailed a train, and took his place with other employees, and on his way he was injured. It was held that he was still an employee, and that his case did not come within the statute relating to the injury of *passengers*. In *Railway Co. v. Salmon*, 11 Kan. 83; in *Russell v. Railroad Co.*, 17 N. Y. 134; in *McQueen v. Railway Co.*, 30 Kan. 689; s. c., 15 Am. & Eng. R. R. Cas. 226; and in *Vick v. Railroad Co.*, 95 N. Y. 267; s. c., 17 Am. & Eng. R. R. Cas. 609, — the plaintiff was a laborer, being carried by the company to or from his work, and was injured by the negligence of those in charge of the train; and it was held that they were fellow-servants with him, and that he could not recover. See also *Ross v. Railroad Co.*, 5 Hun, 488. There are many other similar cases; but they need not be cited, for the principle is sufficiently established. It is questionable whether

any case conflicting with these cases can be found. There are cases which seem to conflict with them; but they are those in which the facts show that the plaintiff was a passenger paying fare, or from whom fare could have been exacted. But if, perchance, there are such cases, we think them unreasonable, and are not disposed to follow them. But, again, it may be said that the plaintiff was still an employee, because he was attempting to use the pathway between the cars as the only customary and convenient means of access to and exit from the round-house which the company had provided, and was under obligation to keep open and safe for him and his fellow-workmen, when he was injured. In *Brydon v. Stewart*, 2 Macq. 30, the plaintiff was a miner, and had quit work in mutiny; and yet the master was held bound to provide his safe exit from the mine as an employee or servant. We conclude, therefore, that the plaintiff, when injured, was an employee and servant of the company, with all the rights and liabilities implied by that relation.

2. Being an employee and servant of the company at the time he was injured, the next question is, whether he was a co-employee or fellow-servant of those in the management of the freight-train whose negligence caused it. The allegation of the complaint is, that the company

Plaintiff was
fellow-servant
of train-men.

“caused the cars to be jammed together by one of its locomotives without warning,” etc. Inferentially, at least, the negligence was on the part of the engineer of the train, who was in charge of said locomotive. But, at all events, those in the management of the train, whether as engineer, brakeman, or conductor, or one of them, was guilty of the negligence. By virtue of that custom, understanding, or contract, by which the cars were to be kept open for the passage between them of the plaintiff and others employed in the round-house, the plaintiff was at the time placed in connection with those in charge of the train, and was specially dependent upon their due care and prudence in keeping the train open at that pathway. It was the plaintiff's business to wipe and clean the engines, and prepare them for the road. Those whose negligence caused his injury had charge of such an engine, through whose instrumentality he was injured. The business of the plaintiff, and that of him or those whose negligence caused his injury, were not very remote from each other, or in very different grade or department. They would seem to be rather intimately connected. Without discussing the rule that has been so many times before this court, we are satisfied that this case falls clearly within the rule of co-employees or fellow-servants. All the cases above cited, to the point that the plaintiff was an employee, held, also, that he was a co-employee of those in charge of the train, and he had

nothing to do with the running of the train whatever, but was simply a common laborer on the track of the road, or a mechanic making repairs. The fact that the plaintiff and those through whose negligence he was injured are engaged in different departments of the same service, does not take the case out of the rule. *Farwell v. Railroad Co.*, 4 Metc. 49; *Foster v. Railway Co.*, 14 Minn. 360 (Gil. 277); *Manville v. Railroad Co.*, 11 Ohio St. 417; *Whaalan v. Railroad Co.*, 8 Ohio St. 249; *Ross v. Railroad Co.*, 5 Hun, 488; *McAndrews v. Burns*, 39 N. J. Law, 117; *Wright v. Railroad Co.*, 25 N. Y. 562; *Coon v. Railroad Co.*, 5 N. Y. 492; *Coal Co. v. Jones*, 86 Pa. St. 432. A member of a repairing-gang and an engine-driver are fellow-servants within this rule (*Railroad Co. v. Murphy*, 53 Ill. 336; *Rohback v. Railroad Co.*, 43 Mo. 187), a master mechanic and locomotive engineer (*Hard v. Railroad Co.*, 32 Vt. 473), the brakeman of one train and the engineer of another (*Wright v. Railroad Co.*, *supra*), a watchman at a street-crossing and a switch-tender (*Sammon v. Railroad Co.*, 62 N. Y. 251), an employee crossing the track on his way to work and the engine-driver who backs the engine upon him (*Keyes v. Railway Co.*, 3 Atl. Rep. 15), a car-repairer and a brakeman (*Railway Co. v. Foster*, 11 Am. & Eng. R. R. Cas. 180), a mechanic in the repair-shop and a brakeman (*Wonder v. Railway Co.*, 32 Md. 419), a section-hand and the engineer (*Clifford v. Railway Co.* (Mass.), 6 N. E. Rep. 751; *Foster v. Railway Co.*, *supra*; *Collins v. Railway Co.*, 30 Minn. 31, 8 Am. & Eng. R. R. Cas. 149; *Boldt v. Railroad Co.*, 18 N. Y. 432; *Blake v. Railroad Co.*, 70 Me. 60), a track-man and baggage-man (*Moseley v. Chamberlain*, 18 Wis. 700), section-man and brakeman (*Cooper v. Railway Co.*, 23 Wis. 668), a shoveller on the track and conductor (*Naylor v. Railway Co.*, 53 Wis. 661; s. c., 5 Am. & Eng. R. R. Cas. 460; *Howland v. Railway Co.*, 54 Wis. 226; s. c., 5 Am. & Eng. R. R. Cas. 578; *Heine v. Railway Co.*, 58 Wis. 525), brakemen and train-men (*Whitwam v. Railway Co.*, 58 Wis. 408; s. c., 12 Am. & Eng. R. R. Cas. 214), car-repairer and train-men (*Luebke v. Railway Co.*, 63 Wis. 91, 23 N. W. Rep. 136), a track-walker and fireman (*Schultz v. Railway Co.*, 28 Am. & Eng. R. R. Cas. 404). Many of these cases are cited in the brief of respondent's counsel, and others are found in a note to the case of *McLeod v. Ginther*, 8 Am. & Eng. R. R. Cas. 162. To cite any more analogous cases is unnecessary, after so many similar cases have been decided by this court. It is too clear for argument that the plaintiff and those whose negligence caused his injury were co-employees and fellow-servants, and that the complaint, for that reason, shows no cause of action against the company. The last point, that, at least, the negligence in part is charged *directly* against the company as the violation of an absolute duty to keep

that pathway open, and that it was a question for the jury as to whose negligence caused the injury, is not in the case. On the demurrer to the complaint, it was the duty of the court to decide whether the company was directly charged with the negligence, or its employees; and, having decided that the complaint charged the managers of the freight-train with the negligence that caused the plaintiff's injury, it decided also that such persons were the fellow-servants of the plaintiff. We think the county court decided correctly. I must say for myself that I regret that such is the rule; but it has been so long established, and so often re-affirmed by this court, that it is now protected by the principle of *stare decisis*. Besides this, the Legislature of this State has sanctioned it by repealing the statute which abrogated it.

The order of the county court is affirmed, and the cause remanded for further proceedings according to law.

Taylor, J., dissents.

Who are Fellow-Servants.—See generally *Criswell v. Pittsburg, etc., R. Co.*, and note, *ante*, p. 232.

INDIANAPOLIS & ST. LOUIS R. CO.

v.

WATSON.

(*Indiana Supreme Court, Dec. 27, 1887.*)

Assumption of Risk by Servant.—**Promise of Master to remedy the Defect.**—A night watchman in a railroad-freight yard, knowing the danger he encounters, assumes the risk of his employment if he works without a lantern, although he has made several applications for one, but has been put off with indefinite promises.

APPEAL from a judgment of the Marion Superior Court, Walker, J., against the defendant in a suit for injury resulting from negligence. Reversed.

The facts are stated in the opinion.

J. T. Dye for appellant.

Shepard, Elam, & Martindale for appellee.

ELLIOTT, J. — Stated in a condensed form, the material allegations of the complaint are these: The appellant maintained a freight-yard near the city of Indianapolis, in which
 Facts. there were many tracks and switches used for handling locomotives and cars. On the fifteenth day of October, 1885, the appellee was in the service of the appellant as a night watch-

man. His duties as such watchman were to go about over the yard at all hours of the night, and look after the property of his employer, and to wake up, at the proper times, its employees. The appellant knew that it was necessary that the watchman should be provided with a light in order that he might properly discharge his duties and at the same time protect himself from danger, yet the appellant refused to provide a light. A day or two after the appellee had been so employed, he notified his employer that it was necessary for him to have a light in order to discharge his duties and to protect himself. His employer promised to procure a light for him in a short time, and requested him to continue in the performance of his duties. Relying on this promise, he did continue in the appellant's service, but the light was not provided as promised. On the night of Nov. 1, 1882, he was injured, without any fault on his part, while in the discharge of his duties; and his injury was caused by the wrong and negligence of the appellant in failing to provide him with a lantern.

The fourth instruction given by the court reads thus: "The general rule is, that when a servant, before he enters the service, knows it to be hazardous, or voluntarily continues his service without objection or complaint when he has such knowledge, [he] is presumed to contract with reference to the state of things as they are known to him; and if he knows that the continuance of such service exposes him to constant and certain danger, the servant in such cases takes the risk upon himself, and, in case he suffers injury thereby, he waives all claims for damages against his master for such injury. As has been said in argument, the master is not required to take better care of his servant than he takes of himself." Appellant's counsel dissect this instruction, and, seizing on the words "without objection or complaint," assail it as erroneous. This course cannot be successfully pursued. The instruction must be taken in connection with the others of the series, and cannot be considered as standing alone. An instruction is not to be judged by taking mere fragments, dislocated from their proper connections; nor is one instruction to be taken as complete in itself. This instruction must, as is well settled, be taken as an entirety and in connection with the others referring to the same subject and immediately connected with it. *Indianapolis v. Gaston*, 58 Ind. 224; *Deig v. Morehead*, 110 Ind. 451. We must therefore take the fourth instruction in connection with that bearing upon the same subject, which is as follows:—

"6. To the general rule I have announced in relation to a servant who, with a knowledge of the dangers of the service, continues in it, there is at least this exception,—that if a servant knows that his service is dangerous, and that he has not been

The court's
instructions.

provided with proper means or implements for the reasonably safe performance of the duties of his employment, and makes complaint to his master, who promises that suitable and proper implements shall be provided him to render his service less dangerous, then such servant may continue in the service a reasonable time, and may recover for an injury sustained by him within such time, if, on account of the master's negligence in failing to supply the means of avoiding danger, the injury results; provided such servant at the time of the injury was not guilty of any negligence which contributed to produce the injury. His care must be also proportioned to the danger, — when the one is increased, the other must be also. Yet all that is required is ordinary care under the circumstances of the case. And you must determine from the evidence in the case what would be a reasonable time within which he might continue in the master's service under said promise, if any was made, and also what would be ordinary care, — that is, such care as an ordinarily prudent and cautious person would exercise under the circumstances of the case. The want of such care is what the law terms negligence."

If these instructions, taken together, express the law, then the appellant has no just cause of complaint, even though the isolated clause which counsel detach and assail should in itself be regarded as an inaccurate statement of the law. Our conclusion is, that, when the instructions are so taken, they express the law as favorably to the appellant as it had a right to ask.

The first of these instructions does not assert that those employees who continue in the master's service "without objection or complaint" do not assume the usual risks of the service. It simply asserts that all who do continue "without objection or complaint" do assume the risks incident to the service, but it by no means asserts that those who do complain and object do not also assume those risks. Possibly the instruction, standing alone, may be incomplete; but it cannot be justly said to be erroneous, since it may be true that all who continue in a service without objection do assume the risks as well as those who do make the objections. But, however this may be, it is sufficiently evident that the fourth instruction is made complete by the sixth, and there is therefore no available error.

The next step takes us into a field of stubborn conflict. There are authorities holding that, where the employee objects to the safety of the appliances furnished him, the employer is liable if the employee is injured while in the employer's service, and within a reasonable time after urging the objection. *Union Man. Co. v. Morrissey*, 22 Am. L. Reg. 547; *Thorp v. Missouri Pac. R. Co.*, 80 Mo. 649; s. c., 58 Am. Rep. 120; 2 *Thomp. Neg.* 1009.

**Liability of
master for
injuries to
servant who
objects to the
appliances fur-
nished him.
Authorities.**

A careful examination of the other authorities relied on by appellee's counsel has satisfied us that they do not decide all that it is asserted they do.

In *Holmes v. Clarke*, 6 Hurl. & N. 349, the master neglected to fence a dangerous place, as an Act of Parliament required him to do, and a servant was awarded a recovery for injuries caused by this negligence. Leaving out of consideration the element introduced by the positive legislation, although it is by no means clear that the Act of Parliament did not exert an important influence, we yet conclude that the case does not sustain appellee's position. *Wabash, St. L. & P. R. Co. v. Locke*, 11 West. Rep. 875. This conclusion we rest upon the words of the opinion in that case, cited by counsel: "Where machinery is required by Act of Parliament to be protected, so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being decayed or withdrawn, but complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant he is responsible." The promise of the master formed, it is obvious, an important factor in the case, and exerted a controlling influence on the judgment of the court. There are some expressions in *Greene v. Minneapolis & St. L. R. Co.*, 31 Minn. 248, s. c., 15 Am. & Eng. R. R. Cas. 214, that seem to support the appellee's contention, but the ultimate decision is against him. It was there said, "If the emergencies of the master's business require him temporarily to use defective machinery, we fail to see what right he has, in law or natural justice, to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the machinery, he has requested or induced him to continue in its use under a promise thereafter to repair it." At another place, the court, in speaking of the general rule, asserts that the master is liable, where the servant gives notice of the defects, and the "master thereupon promises that they shall be remedied." The utmost that can be deduced from the case under immediate mention is, that the servant may continue in the service a reasonable time after the promise to make the machinery or appliances safe, and that if he is injured within that time he may maintain an action. The cases of *Kroy v. Chicago, R. I. & P. R. R. Co.*, 32 Iowa, 357; *Greenleaf v. Dubuque & S. C. R. R. Co.*, 33 Iowa, 52; *Muldowney v. Illinois Cent. R. Co.*, 39 Iowa, 615; *Lumley v. Caswell*, 47 Iowa, 159; and *Way v. Illinois Cent. R. R. Co.*, 40 Iowa, 341, do not, as we understand them, go farther than to hold that the master is not liable where the servant continues in

his service with notice of its danger, unless he has induced the servant to do so by an express or implied promise. In *Way v. Illinois Cent. R. R. Co.*, *supra*, it was held error to refuse an instruction containing this clause: "If a brakeman on a railroad knows that the materials with which he works are defective, and he continues his work without objection, and without being induced by the master to believe that a change will be made, he is deemed to have assumed the risks of such defects." This, we think, implies that there must be a promise, either in express words or arising by fair implication from the conduct of the master. Going back to the case of *Kroy v. Chicago, R. I. & P. R. R. Co.*, we find the principle upon which the subsequent decisions rest, for they are all built upon that case. It was there said, "Another important modification of the liability of a master for an injury to an employee, which is sustained by an almost unbroken current of authority in this country and in England, is that, if a servant knows that a fellow-servant is habitually negligent, or that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risks of such defects." This ruling certainly does not sustain the appellee's contention that if an objection and protest are made, the master becomes liable. The case of *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, cannot be regarded as in point on this question, nor can the case of *Indiana Car Co. v. Parker*, 190 Ind. 181; for both of these cases simply affirm the general rule, that it is the duty of the master to provide his servants with a safe working-place, and with safe machinery and appliances. In *Patterson v. Pittsburg & C. R. R. Co.*, 76 Pa. 389, there was an express promise on the part of the master, and that fact gives a controlling force to the decision there made. We are referred to Dr. Wharton's statement that "in this country the exception has been still further extended; and we have gone so far as to hold that a servant does not, by remaining in his master's employ with knowledge of defects in machinery he is obliged to use, assume the risks attendant upon the use of such machinery, if he has notified the employer of such defects, or protested against them, in such a way as to induce a confidence that they will be remedied." Whart. Neg. 1st ed. sect. 221.

If it were conceded that this is a correct statement of the law, still it would not supply a premise for the conclusion that an objection or protest exempts the servant from the general rule that he assumed the risk; for it is implied that something must be done by the master to induce the belief that the defect will be remedied, and it is difficult to conceive what other thing than

a promise, express or implied, can be regarded as sufficient to induce such a belief. We find, on examining the later edition of Dr. Wharton's book, that he adds to what is copied from the earlier edition, by counsel, these words: "Such confidence being based on the master's engagements, either express or implied;" and that he modifies the statement in other respects. Whart. Neg. 2d ed. sect. 220. This author is, indeed, inclined to condemn the exception to the general rule, even as he states it, for he says, "The only ground on which the exception before us can be justified is, that, in the ordinary course of events, the employee, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to cases where the employee sees that the defect has not been remedied, and yet deliberately and intelligently exposes himself to it." Whart. Neg. 2d ed. sect. 220.

The rule, which we regard as sound in principle and supported by authority, may be thus expressed: The employee who continues in the service of his employer after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent, the exception cannot exist. In support of our conclusion we refer to these authorities: *Russell v. Tillotson*, 140 Mass. 201; *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206; *Hatt v. Nay*, 144 Mass. 186; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113; s. c., 77 Am. Dec. 212, 218, and authorities, note; *Galveston & S. A. R. Co. v. Drew*, 59 Tex. 10; s. c., 46 Am. Rep. 261; *Webber v. Piper*, 38 Hun, 353; s. c., 33 Alb. L. J. 64; *Pennsylvania Co. v. Lynch*, 99 Ill. 333; *Wood, Mast. & Serv.* 21; *Beach, Contrib. Neg.* 372.

The rule absolving the servant from the assumption of risks is an exception to the general rule, for the general rule is, that the servant does assume all the ordinary risks of the service he enters. There must, therefore, be some ground for the exception, and the only solid ground that can be found is the inducement held out by the agreement of the master. If this be not so, then an employee, at his first entrance into service, might object and protest, and successfully claim that he was exempt from the perils of the service. Or, if our theory be not sound, a mere complaint or objection might, in effect, overthrow the general rule, and this would result in confusion and uncertainty. We can see no way to hold that the servant is exempt from the known risks of his service, where there is no express or implied contract on the part of the master, without completely nullifying

the general rule. The servant is at liberty to quit the service; and, if he remains after knowledge of its danger, he assumes the risks, even though he may object or complain, unless he is induced to continue by a promise of the master to remove the cause that augments the danger, since, if this be not true, it must be true that any objection or complaint, made at any time, will absolve him from the risk, and this conclusion cannot be sustained. As the exception concedes and tries the general rule, it cannot be allowed to destroy it; for, if it were allowed to do this, it would cease to be an exception. *Sweeney v. Berlin Co.*, 101 N. Y. 520.

The evidence in this case, as counsel concede, shows that a lantern was essential to the service the appellee undertook to perform; that, as the appellee knew, without the lantern the act which he was engaged in performing subjected him to great danger, and he was injured while attempting to perform it. Nor does the counsel for the appellant, as we understand his argument, contend that it was not the duty of the company to provide the lantern; nor does he question the authority of the person to whom the appellee made application for one, to act for the company in such cases. The central position assumed is, that the evidence does not show any promise. This is the question presented to us, and the question to which we, at this point, limit our decision. We are therefore required to determine whether there is evidence fairly supporting the verdict on this subject, and in doing so we must take that which the jury deemed credible and trustworthy. *Julian v. Western U. Tel. Co.*, 98 Ind. 327.

We cannot sustain the verdict unless we find, in the record, evidence tending to prove that a promise to remedy the cause of the augmented danger of the service was made by the appellant, and that this promise induced the appellee to remain in the service after he acquired knowledge of the increased peril caused by his employer's failure to furnish him with a lantern. Two things must concur, — the promise, express or implied; and the inducement created by it. If either be absent, the case fails. If no reliance was placed on the promise, there could not have been an inducement influencing the appellee to continue in the service with knowledge of its increased danger; and if no promise was made, the case is still stronger against the appellee, for in that event there could be no possible ground for the position that the employer induced him to continue in the service.

The appellee's argument on the point under discussion is, that the evidence shows "three conversations between the servant and his master's agent: the first two being friendly, and resulting in each case in a distinct promise to furnish the lantern;

the third was due to the neglect of the master and the persistence of the servant, and was characterized by some angry words, but there was no withdrawal of the promise before made, — nothing but an angry, petulant remark, indicating, at most, that the fulfilment of the promise might be delayed. That the servant continued in the service with the expectation that the master would do his duty, and looked every night for the fulfilment of the promise. That he was sent by the agent of the master to do the particular service in which he was injured, and that he was doing his best to see the location of moving cars, and could have done so with a light; but, having none, was misled as to the track the moving cars were on, from having seen a train being made up on track No. 3, and was thus injured by a sudden jar from a car on track No. 2, which he did not expect, and had no reason to anticipate, and against which he had taken no precaution.”

The servant's request for a lantern, and promises made.

In substance, the argument of the appellant is this: “Instead of a promise to furnish a lantern, there was a quarrel, in which defendant's agent accused plaintiff of carrying off the lantern, and told him he would be lucky if he got another in a month. There was no promise at all. This was the last conversation upon the subject. There was no request that plaintiff should remain in defendant's service until a lantern should be furnished.

“The plaintiff emphatically swears that defendant's agent did not lead him to believe he would get a lantern short of a month, and that he went to work without any expectation that Howells, the defendant's agent, would get him a lantern in less than a month; and in this same conversation he threatened to ‘lamm’ the agent because ‘it looked like he did not care for plaintiff's safety.’

“Now, if there had been a promise to furnish a lantern at the end of thirty days, that would not relieve plaintiff from the risk incurred by working without a lantern for that thirty days, when, as he says, he had no expectation that a lantern would be furnished.”

It is true, as appellee's counsel affirm, that there were three conversations, and that in two of them a promise was made; but it is also true that the appellee, finding that the promise was not kept, entered complaint, and was told in the last conversation that he would be lucky if he got a lantern in a month. It is likewise true that the appellee did not, after the last conversation, rely on the promise previously made, for he testified that he did not expect to be supplied with a lantern. This is his own testimony: “After I had asked him for the lantern twice, and then left orders twice, I went over early to see him myself,

and told him it was dangerous, — it was a dangerous place to be without a lantern, — and it seemed like it made him out of humor, and he said, ‘You may think yourself well off if you get a lantern in a month,’ and then I did not say any thing more to him about it. That was two weeks before I was hurt that I asked Mr. Howells for the last time for a lantern. Well, when he would not get me a lantern, and when he spoke the way he did, I got a little excited; and when I get excited I will say what I please. He said the men need not be carrying their lanterns off, they were all charged up to them. I told him I had not lost my lantern, and had not carried it off, but put it into the box; and that, if he would have a box for the night men and a box for the day men, they might save their lamps. It was in this same conversation that he told me I would be lucky if I got another lantern in a month. It was after that I had a rough talk with him, because he had insulted me there, because it looked like he did not care for my safety.” In answer to this question, “He did not lead you to expect that he was going to get a lantern for you short of a month in that conversation, did he?” the appellee said, “No, sir.” He was also asked this question: “And you went over to work in the yard without a lantern, and without any expectation that Howells would get a lantern for you within a month, did you not?” And his answer was, “Yes, sir.” The appellee also testified that Howells was the only man he ever asked for a lantern, and thus narrates one of the first conversations: “I told him I had been pretty nearly killed down in the yard once without a lamp, and I did not want to be killed by neglect of having the lamp there; then I got a little out of fix because he didn’t furnish me a lamp, and I told him I had pretty nearly got killed in that yard by being struck by a car, and all that. That is what I said, and then he promised to get me a lamp.”

After a careful study, we find ourselves unable to resist the conclusion that the verdict cannot be sustained. We are constrained to hold that the appellee was not induced to remain in the appellant’s service by any promise, express or implied. On the contrary, the clear and irresistible inference from the evidence is, that the promise was withdrawn, and that the appellee continued in the service, knowing its great danger, without any promise that the lantern or lamp required to make it safe would be provided. He himself says that he “went on with the work without any expectation that Howells would get a lantern” for him within a month. This shows the construction put by appellee upon the words of Howells, and it is the only natural and reasonable construction that the words will bear. With this, the appellee’s own, testimony before us, we can see no other course

consistent with duty open to us save that which leads to a reversal of the judgment. We must affirm that an employee who continues in the employer's service after he has acquired knowledge of its great and immediate dangers, assumes the risk unless he is induced to continue in the service by a promise, express or implied.

We do not depart from the rule that an employer is bound to use ordinary care to provide a safe working-place and safe appliances for his employees, but we do hold that the rule cannot apply to such a case as this. The rule itself we regard as firmly settled. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Krueger v. Louisville, N. A. & C. R. Co.*, 111 Ind. 51; s. c., 31 Am. & Eng. R.R. Cas. 328; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; s. c., 31 Am. & Eng. R. R. Cas. 149.

Employer's
duty to provide
safe appliances.
Promises to
repair defects.

It is the application of the rule as made by the appellee, and not the principle it asserts, that we deny. The rule asserts that the machinery and appliances must be kept safe as against those who do not know of their unsafe condition, but does not apply to those who know of its unsafe condition, and still continue in the service without being induced to do so by the employer's promise. The employee has a right, until he acquires knowledge of danger, or by reasonable care might acquire such knowledge, to act upon the assumption that his employer will use ordinary care to provide safe appliances; but when he becomes fully informed of the danger, he can no longer act upon this assumption. Knowledge on his part puts an end to his right to assume that the master has done his duty. It is manifest that one who knows that a duty has not been performed cannot reasonably assert that he acted upon the assumption that it had been performed. The case therefore falls within the rule that the employee assumes the risk of all the dangers of which he has knowledge. *Pennsylvania Co. v. Whitcomb*, *supra*; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75; *Lake Shore & M. S. R. Co. v. Stupak*, 108 Ind. 1; s. c., 28 Am. & Eng. R. R. Cas. 323; *Umbach v. Lake Shore & M. S. R. Co.*, 83 Ind. 191; s. c., 8 Am. & Eng. R. R. Cas. 98.

Where there is a promise to repair, which induces the employee to continue in the service, then, doubtless, he may, for a reasonable length of time, rely on the promise and continue in the service, unless the danger of continuance without a removal of the cause of it is so great that a reasonably prudent man would not assume it. *Hough v. Texas & P. R. R. Co.*, 100 U. S. 215; *Loonam v. Brockway*, 3 Robt. (N. Y.) 74; *Rockwell v. Jewett*, 46 Ill. 99; *Crichton v. Keir*, 1 Macph. 407.

Some of the cases go farther, and assert that the promise

of the employer exonerates the employee entirely, even though the continuance in the service is known to him to be constantly and immediately dangerous. *Ft. Wayne, J. & S. R. R. Co. v. Gildersleeve*, 33 Mich. 133. We are not inclined to adopt this view. Our opinion is, that if the service cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employee, he assumes the risk if he continues in the service. It is a fundamental principle in this branch of jurisprudence that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to perceive why a promise should relieve the party injured through his own contributory fault. If the danger is not great and constant, then such a promise may well be deemed to relieve him; but where it is great and immediate, and is of such a nature that a prudent man would not voluntarily incur it, a promise does not nullify or excuse the contributory negligence. Even if there be a promise by the employer, the employee must not subject himself to a great and evident danger, since this he cannot do without participating in the employer's fault. The community have an interest in such questions, and that interest requires that all persons should use ordinary care to protect themselves from known and certain danger. A man who brings about his own death or serious bodily injury sins against the public weal. All must use ordinary care to avoid known and immediate danger, although it is not the assumption of every risk that violates this rule. When the line of danger, direct and certain, is reached, there the citizen must stop; and he cannot pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur. Proceeding upon a somewhat different line of reasoning, other courts have reached the same conclusion as that to which we are led. *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Crichton v. Keir*, *supra*; *Couch v. Steel*, 3 El. & Bl. 402.

The general principle which rules here is strongly illustrated by the cases which hold that a passenger cannot recover for an injury received while acting in obedience to the directions of the conductor in whose charge he is, where obedience leads to a known danger which a prudent man would not voluntarily incur. *Lake Shore & M. S. R. Co. v. Pinchin*, 11 West. Rep. 247; *Cincinnati, H. & I. R. R. Co. v. Carper*, 11 West. Rep. 221. If the rule prevails in such cases, much stronger is the reason why it should prevail in a case like this, where ordinary care is required of employer and employee alike; while, in the class of cases referred to, the highest degree of practicable care is required of the carrier, and only ordinary care exacted of the passenger.

It is probably true that the promise of the employer, when relied on by the employee, will rebut a presumption of contributory negligence in cases where the danger is not great and immediate; but this presumption yields whenever it appears that the employee voluntarily incurs a known and immediate danger of so grave a character that it would deter a reasonably prudent man from incurring it.

In the case before us the testimony convincingly shows that the appellee knew the danger he encountered; and it shows also that it was so great and immediate that a prudent man would not have assumed the risk it created. It results that, even if it were conceded that there was a promise and a reliance on it, there could be no recovery.

Reluctant as we are to set aside a verdict which has passed the scrutiny of a learned trial court, we cannot do otherwise in this instance.

Judgment reversed.

ON REHEARING.

ELLIOTT, J. — In a very forcible and able brief, counsel for the appellee contend that we departed from the established rule, and weighed the evidence. In this, counsel are in error. We took the evidence as we found it in the record, and decided, on the uncontradicted evidence, that there could be no recovery. The decision of the case, in the main, depends upon the question whether there was a promise, relied upon by the appellee, exonerating him from the consequences of his negligence in remaining in the appellant's service after he acquired full knowledge of its dangers. We have held in many cases, that, where the evidence fails to make out a case, the judgment will be reversed. *City v. Dunlap*, 112 Ind. 576; *Railroad Co. v. Long*, 112 Ind. 166; *Riley v. Boyer*, 76 Ind. 152; *Railroad Co. v. Morton*, 61 Ind. 539; *Roce v. Cronkhite*, 55 Ind. 183; *Ray v. Dunn*, 38 Ind. 230; *Crossley v. O'Brien*, 24 Ind. 325. Where, as here, there was only one witness upon a pivotal point, it is our duty to apply the law to his testimony, and if, under the law, the testimony is not sufficient to sustain a recovery, so adjudge. Where there is no conflict of testimony, the court must necessarily decide the legal effect of the testimony in the record. In doing this, there is no departure from the long-settled rule to which counsel refer. The question of negligence is never one exclusively of fact. The jury finds the facts; but if, from the facts, one inference only can be drawn, and that is, that there was negligence, it must be so adjudged as matter of law; or, conversely, if it can be clearly affirmed, as matter of law, that there was no negligence, the court must so declare. In no case where negligence is the issue

does the court entirely abdicate its power; for as to the law it must always rule, although in some instances the jury ultimately decide whether there is or is not negligence, but in every case the court must declare the law. In ruling that there is no negligence, the court does not rule upon a question of fact. Judge Holmes says, "Where a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability; and this is the way the law is constantly enriching itself from daily life, as it should." Com. Law, 120. This principle applies here; for we rule, not that there is no evidence of a fact, but that the facts proved do not create a legal liability. It has been very often decided by our own and by other courts, that, where the facts are undisputed and unequivocal, the court must apply the law to them. *Railroad Co. v. Locke*, 112 Ind. 404, and cases cited; *Railroad Co. v. Spencer*, 98 Ind. 186; s. c., 21 Am. & Eng. R. R. Cas. 478, and cases cited; *Counsell v. Hall*, 14 N. E. Rep. 530.

The doctrine that the welfare of society forbids a man from thrusting himself into immediate and certain danger without pressing necessity, remounts in the case of *Hales v. Petit*, 1 Plow. 253, — a case made famous because of its having suggested, as many suppose, to Shakspeare the grave-diggers' scene in "Hamlet." Although the reasoning of that case is quaint and fanciful, still the principle asserted is a wise one, and has long formed part of our jurisprudence. We did not assert in our former opinion that an employee who takes a risk that imperils his safety cannot maintain an action; but we did decide, that, if he knowingly and deliberately assumes a risk that will lead him into immediate and certain danger, he cannot recover, although his employer has promised to remedy the defect. The authorities we cited sustain this principle, and we applied it to the uncontradicted evidence. Where, as here, there is only one witness to a material fact, we must act upon his testimony, and in applying a principle to it we do not weigh evidence. *Railroad Co. v. Long*, 112 Ind. 166; *Palmer v. Railroad Co.*, 112 Ind. 250.

It may be that on another trial the evidence may be such as to take the case out of both the rules here stated, for it may well be that additional evidence will explain the testimony given by Mrs. Watson, or prove circumstances giving it a different meaning and effect; but, as the record presents the case to us, we find, by applying the law to the evidence, that the verdict is not supported. Petition overruled.

Risks Incident to Employment assumed by Servant. — See note to *Wilson v. Winona & St. P. R. Co.*, 31 Am. & Eng. R. R. Cas. 246, where cases are collected.

Rule in Virginia.—It is the duty of railroad companies to provide "repair tracks," have danger signals, and all appliances reasonably necessary to insure the safety of employees, and to properly instruct their officers; and if they omit to do so they will be liable in damages for injuries sustained, unless such injuries are due to want of ordinary care on the part of those injured. If, owing to the negligent and dangerous manner in which a railroad company carries on its operations, an employee receives injuries while performing his duties, he is not prevented from recovering damages from the company by reason of his having continued in its service with full knowledge of the manner in which its operations were conducted and without complaint. *Richmond & V. R. Co. v. Norment* (Va.), 4 S. East. Rep. 211.

Track Laborer stepping from one Track to another Assumes Risk of Injury from Trains.—A track laborer who, to avoid a passing train, steps from one track to another instead of to the side of the track, assumes the risk of injury from trains on the other track; and for his death from being struck by such a train, his widow and children cannot recover from the railroad company. *Shea v. Pennsylvania R. Co.* (Pa.), 11 Cent. Rep. 769.

Engineer runs Risk of Accident liable to happen on account of Green Switch Target.—In an action against a railway company for the death of plaintiff's intestate, resulting from an accident caused by a misplaced switch, it appeared that the switch target was painted green, and the plaintiff contended that if it had been red it could have been more readily seen at a distance, and enabled intestate to stop his train in time. *Held*, that as all the switch targets on the road were green, and had been for two years, during which time intestate had been in the employ of the company, he is presumed to have accepted it as one of the risks of the employment. *Naylor v. New York Cent. & H. R. Co.*, 33 Fed. Rep. 801.

Fireman assumes Risk of encountering Cattle on the Track.—Railroad corporations have the right, in the absence of a duty imposed by statute or contract, to fence their roads or not, and to construct their road-beds in respect to curves and grades as they see fit. And where a fireman on a railroad train has been over the road, and had opportunity to learn the character of the road as to curves, grades, and fences, and that of the country traversed, and its use for pasturage, and continues in his employment without objection, he assumes all risk arising from the unfenced condition of the road and the consequent danger of encountering cattle on the track, or from the peculiarities of the road-bed as to grades and curves. And where an unfenced road runs through pasture land, cattle must be expected on the track at any time; and it is not the duty of the company to warn employees engaged in operating trains on the road of the danger of encountering cattle. *Patton v. Central Iowa R. Co.* (Iowa), 35 N. West. Rep. 149.

Assumption of Risk of Passing over Open Cars not provided with Foot-Boards.—The plaintiff accepted service as a brakeman, knowing that defendant did not usually provide foot-boards over open cars loaded with machinery; but it was not shown to be defendant's custom to so arrange such cars in a train that brakemen would have to pass over them. *Held*, that plaintiff did not assume that risk. *Hosic v. Chicago, R. I. & P. R. Co.* (Iowa), 37 N. West. Rep. 963.

Accident caused by Running Train at Excessive Rate of Speed is not Risk assumed by Servant.—A charge in an action for damages against a railroad company, that "if its locomotive had frequently passed over this curve, but on this occasion it ran off the track while passing speedily over it, and this accident happened from no other cause, then such accident was none of the risks which [plaintiff's intestate], as a brakeman, undertook in the business of railroading," is properly refused, since it lacks the qualification that the train must have been running at high speed, without negligence, especially where the complainant alleges, and there was evidence to show that, owing to the

condition of the track, it was an act of negligence to run at high speed. *Conners v. Burlington, C. R. & N. R. Co.*, 37 N. West. Rep. 966.

Injury to Brakeman caught between Car and Building at Side of Track is Risk assumed. — Plaintiff, a brakeman in the employ of defendant company, was injured by being crushed between a car, from which he was descending, and the "oil-house," standing at a distance of about two and a half feet from the rail, and clearing an ordinary car by about eight or nine inches. *Held*, that the cause of the injury was one which was open, permanent, and visible in its character, and the risk of which plaintiff assumed when he entered defendant's service in the capacity in which he was employed; and further, that the injury was the result of plaintiff's own negligence in not paying proper attention to the risk incurred in the performance of the act in which he was engaged at the time of his injury. *Kelly v. Baltimore & O. R. Co. (Penn.)*, 11 Atlantic Rep. 659.

Injury caused by Formation of Ice on a Car is Risk assumed. — In an action to recover damages against a railroad company for the wilful, negligent killing of deceased, a brakeman in the employ of the defendant company, it was shown that the immediate cause of the accident was the formation during winter of sleet or ice on the edge of the car, where deceased was compelled to stand while handling the brake, and that no salt or sand with which to remove it had been furnished by the company. *Held*, that plaintiff could not recover. *Obannon v. Louisville & N. R. Co.*, 6 S. West. Rep. 434.

Injury caused by Step on Engine being too High. — Brakeman, knowing it, accepts the Risk. — Where plaintiff knew that the step on an engine was so high as to render it difficult to get on, and had used it without giving notice of its condition, he cannot recover when injured thereby, having voluntarily accepted the risk. *New York, L. E. & W. R. Co. v. Lyons (Pa.)*, 13 Atlantic Rep. 205.

Injury to Section Foreman through Defect in Track of which he had Notice, but had been promised Materials for Repair. — While a section foreman on a railroad was returning from his work, on a hand-car, his foot was caught by a broken tie, which had bulged or sprung up in the middle of the road, and he was thrown from the car and injured. It appeared that he had a short time previously, in discharge of his duty to the company, reported the bad condition of his section of the road (but did not do so through any fear of injury or accident to himself in the course of his employment), and had demanded materials for necessary repairs, which were promised, but never furnished. Relying on such promises, he continued in the company's employ up to the time of the injury. *Held*, that this will not preclude his recovery for the injuries sustained, in the absence of any contributory negligence. *Gulf, Colo. & S. F. R. Co. v. Donnelly (Tex.)*, 8 S. W. Rep. 52.

PHILADELPHIA & READING R. Co.

v.

HUGHES.

(*Pennsylvania Supreme Court, March 19, 1888.*)

Duty of Railroad Company as to providing Machinery. — A railroad company is only bound to provide such machinery as is reasonably safe and in common use, and not the very best procurable, nor that combining the latest improvements.

Presumption as to Quality of Iron used in Car-Brakes. — In the absence of proof to the contrary, there is a presumption that iron used in the construction of a car-brake is of good quality, and the jury should be so instructed.

Duty of Company as to Inspection of Machinery. — A railroad company is not required to exercise that exhaustive care in the constant examination and overhauling of its machinery which would be incompatible with the proper furtherance of business.

Injury to Employee caused by Defective Brake-Pin. — A brake which had been examined and found in good order a short time before, fell when plaintiff attempted to use it, and he was thrown under the car. There was no evidence as to whether the brake-pin fell out or broke, or that proper inspection could have prevented the accident. *Held*, that, in the absence of proof showing negligence on the part of the company, plaintiff could not recover.

Employee knowing of Defects runs the Risk. — An employee who makes no complaint to his employer as to the machinery which he knows to be wanting in appliances for safety, and takes no precaution to guard against injury, cannot complain if he is subsequently injured.

ERROR to the Common Pleas of Schuylkill County to review a judgment in favor of the plaintiff in an action on the case for personal injuries. *Reversed*.

This action was brought by Jeremiah A. Hughes against the Philadelphia & Reading Railroad Company, to recover damages for injuries sustained by the plaintiff alleged to have been caused by the negligence of the defendant.

At the trial before Bechtel, J., the following facts appeared: —

In September, 1871, and for about three years prior to that time, the plaintiff was employed as a brakeman by the defendant on what is called the Mine Hill Railroad, which was operated under a lease by the defendant company.

Sept. 29, 1871, while acting as a brakeman on the Mine Hill road, he was injured by falling under one of the coal-cars of the train on which he was employed. The accident occurred near Cressona. The plaintiff claimed that the accident was caused by the pin breaking or dropping out of the brake which he was applying.

The other facts of the case are fully stated in the opinion.

Verdict and judgment for plaintiff for \$2,500.

The defendant presented, *inter alia*, the following points: —

“5. There is no evidence in the case to show that the iron in the pin in the brake was bad, or that it was bad when it was furnished to the railroad company. The law presumes that the railroad company, defendant, has furnished suitable appliances and safe tools and machinery for its employees, and has employed competent inspectors to inspect its cars and appliance; and the burden is on the plaintiff, Hughes, to prove that the railroad company, defendant, did not furnish safe tools, machinery, and appliances for its railroad, and did not employ competent men to inspect the cars, machinery, and appliances.

"*Ans.* We affirm this point, except that part which requests us to say that there is no evidence to show that the iron in the pin was bad ; we leave you to ascertain what the evidence in this case shows and proves, without any opinion from us, and from all the testimony before you." [1]

"11. There is no evidence in this case that the railroad company did not furnish suitable tools and appliances for the use of its employees, of whom Jeremiah A. Hughes, the plaintiff, was one at the time of the accident ; and the plaintiff cannot recover.

Ans. "Refused." [2]

"12. Under all the evidence in this case, Hughes, the plaintiff, cannot recover.

"*Ans.* Refused." [3]

The *assignments of error* specified the answers to defendant's points, as indicated by numerals.

J. F. Whalen and *James Ellis* for plaintiff in error.

D. C. Henning and *F. W. Bechtel* for defendant in error.

CLARK, J. — The plaintiff, Jeremiah A. Hughes, was at the time he received the injury complained of, on Sept. 29, 1871, a brakeman in the employment of the Philadelphia & Reading Railroad Company, and in the performance of his duty as such employee. There was therefore, in the mere fact of the injury, no presumption of negligence on the part of the company, as in the case of a passenger ; the burden of proving negligence rested upon the plaintiff.

It was the duty of the company to exercise ordinary care in adopting, providing, and maintaining safe cars, with suitable appliances and machinery, with which the plaintiff might transact the business of the company within the line of his duty ; not the very best machinery which could be procured, or that which combined the latest device or improvement, as a precaution against danger, but such as was reasonably safe and in common use. It was the duty of the company also to use ordinary and reasonable care in the employment of his fellow-servants or employees, and to dismiss any of these whom it might know, or in the exercise of ordinary diligence should have known, to be careless, or unfit for the places assigned them.

On the other hand, the plaintiff will be understood to have assumed, not only all the risks incident to his employment, but also those arising from the negligence of his fellow-employees in the same circle of employment.

Moreover, as we said in *Rummell v. Dilworth*, 111 Pa. 343, "If a person specially undertake to perform a peculiarly perilous work, by operating a machine obviously wanting in suitable appliances for safety, knowingly

Burden of
proof on
plaintiff.

Duty of com-
pany as to
machinery.

Plaintiff ran
risk of his em-
ployment and
of negligence
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and voluntarily, he cannot afterwards complain, in case of injury in consequence thereof, that the machinery was of a dangerous kind, and that it was wanting in appliances reasonably necessary to render it safe. So, upon an analogous principle, if an employee, after having a full and fair opportunity to become acquainted with the risk of his situation, makes no complaint whatever to his employer as to the machinery which he knows to be wanting in appliances for safety, takes no precaution to guard against danger, but, accepting the risks, voluntarily continues in the performance of his duties, he cannot complain if he is subsequently injured by such exposure."

Now, it is conceded that the brakes upon all of the Mine Hill cars were of the kind which caused the injury; that the difference in their construction from others in use was open and obvious; that Hughes had been a brakeman on these cars for three years and upwards, and that if the operation of this brake was peculiarly perilous, he knew, or by reason of his long experience ought to have known, the fact. He admits that he made no complaint whatever, and that he continued in the company's service. The inference is irresistible, therefore, that he accepted the risks incident to this particular employment. He was not bound to risk his safety in the service of the company; and if he knew the brakes to be wanting in any appliance which would be a precaution against danger, it was his duty to decline to operate them; having undertaken the performance of duties he knew to be hazardous, he assumed the risks incident to their discharge.

In this view of the case the peculiar construction of the brakes was a matter of little importance; the main question of difficulty arises out of the fact that when Hughes stepped upon the brake, the iron pin, which passed through the fork at the lower end, and formed the fulcrum of the lever which held the brake-block in place, either broke or dropped out, and Hughes fell to the ground, and under the wheels. This pin was ordinarily kept in place by a key; but, as neither the pin nor the key was afterwards found, it is impossible to state from what cause the accident occurred, — whether the pin was broken, or whether it fell out from some defect or displacement of the key.

The happening of the accident. Presumption that iron was good.

There is some evidence that this car, No. 7, had been rebuilt shortly before the occurrence. The negligence of the company in the rebuilding of the car is not to be presumed. The presumption is, that the pin was made of proper material, and that presumption is greatly strengthened by the testimony of Daniel Grimm, the blacksmith, who says that it was made of good iron, and was properly adjusted and secured when it left the shop. Upon a careful examination of the testimony, we fail to find the slightest

proof that the iron in this pin was bad ; there was literally no evidence to justify the jury in coming to any such conclusion. We do not even know that the pin broke : it may have fallen out. The key may have been removed : the evidence shows that they are sometimes taken out and imperfectly replaced. The jury would not have been justified in determining that the pin was of bad iron upon mere conjecture. We think the court should not have referred this question to the jury ; the presumptions and the proofs were all to the effect that the iron was good, and the jury should have been so instructed. We are of opinion that the defendant's fifth point should have been affirmed without qualification.

The second specification of error raises the question whether or not there was any evidence that the company failed to furnish and *maintain* suitable tools and appliances for the use of the plaintiff. There was no evidence, as we have said, aside from the peculiar construction of the brake, that the car was imperfectly constructed. But the point which was refused involves also the question of proper inspection and repair.

It is undoubtedly the duty of railroad companies to exercise ordinary care in the maintenance of the machinery and tools which they put into the hands of their employees, and to institute proper reasonable regulations for the safety of their employees in this respect ; but this rule of duty must be taken in a practicable and reasonable sense. The company does not insure the life of its employees ; the servant assumes, as we have said, the ordinary risks of his employment, and if any defect in the tools or machinery placed in his hands becomes apparent in their use, it is the duty of the servant to observe and report to his employers, for the servant has means of discovering defects which the master may not possess. If, however, the company employs competent and skilful persons for the purpose of inspection, and affords them reasonable opportunities and facilities for the work, under proper instructions, the company will not, ordinarily, be liable for the negligent performance of the work by their employees to a fellow-employee ; unless the company knew, or by ordinary diligence ought to have known, of the defective manner in which the inspection was conducted.

We are clearly of opinion, too, that a brakeman and a car inspector are in the same circle of appointment, they co-operate in the same business, and the former knows that the employment of the latter is one of the incidents of their common service. But while the performance of the duty of inspection must necessarily be committed in detail to the employees, the general regulation is in the hands of the company ; and it is the duty of the

company to provide suitable persons, in sufficient numbers, at proper places, with reasonable opportunities to accomplish the work. The evidence would seem to show that there were three points for the inspection of these cars within twenty miles: at Schuylkill Haven, where the empty cars were inspected on their way to the mines; on the Gordon Plane; and at Cressona, where the loaded cars were inspected as they came from the mines; besides other alleged inspections to which the cars were subjected at the coal chutes, and by Daniel Grimm, who, it is said, had these cars in his special charge. The inspections at these points were not minute or critical, they were limited to a hurried examination of the most exposed and important points; the cars were subjected to a thorough examination only when turned into the shop for repairs.

Whether this provision of the company in view of the heavy grades along the road, and the number of cars to be inspected, was a reasonably adequate one, would, if the question were material, be for the determination of the jury. It is absurd, however, to suppose that in these inspections the company was required to remove the bolts, screws, pins, or other appliances belonging to the machinery of a car, *en route*, in order to detect any possible imperfections. A railroad or other employer is not required to exercise that exquisite and exhaustive care in the constant examination and overhauling of its machinery and work which would be incompatible with the proper furtherance of business. Whart. Neg. 213.

But is there any evidence that the injury complained of was attributable to a negligent inspection? Was there any defect in this brake which any reasonable provision for inspection would have disclosed? Bearing in mind that the burden of proof rests upon the plaintiff, is there any evidence that the pin was defective? It was properly constructed; it was of the size used in all the brakes; the proof as well as the presumption is, that the iron was good, or was believed to be good. It was properly secured by a key, and had been in use for several months. It is conceded that the brake was in proper condition on the grade above Minersville; and the accident occurred, as we understand the case, only three or four miles distant from that place; while the next place of inspection was Cressona, a short distance below.

But if the iron was bad, was the defect such as might have been detected, upon any reasonable inspection? Was it such a defect even as could have been observed if the pin had actually been withdrawn and examined; or was the defect latent, such as could not have been observed? Did the pin break at all? If it did, was it the result of accident, or negligence? If the pin did

No negligent
act of the com-
pany shown.

not break, says the plaintiff, it fell out from displacement of the key. Is there any evidence that the key had fallen out or been removed? Was the jury to guess at the real facts of the case, and to determine these questions of fact upon mere conjecture? The plaintiff undertook to trace the injury to the negligence of the company; and until he can show some negligent act which was the proximate cause of his injury, he cannot recover.

We know that when Hughes stepped on the brake with his whole weight, it went down, and he went with it. But whether the pin broke, from any defect which a proper inspection would have disclosed, does not appear; that it broke at all is not shown, nor is there any evidence that the occurrence was owing to a dislocation of the key. It devolved upon the plaintiff to show negligence of the company, and that that negligence was the proximate cause of the injury. In this he has failed; and in the absence of proof on that point we cannot ascribe the accident to that cause.

The judgment is reversed.

Extent of Master's Duty is to furnish Servants reasonably Safe Machinery. — A master's duty is performed when he furnishes for his servants machines that are reasonably and adequately safe, and it is error for a court to instruct the jury that it is his duty to provide safe machinery; but when the correct rule is clearly and plainly stated in the same instruction, and in almost the immediate connection, and it appears from the findings of fact that the machine inquired about was defective and out of repair, it is not such an error as would necessitate a reversal and retrial of the action, when it further appears that it was tried upon the theory that such machine was not perfectly safe. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592.

Spike-Hammer is not Machinery. — A hammer used for driving spikes into cross-ties on a railroad is not machinery, within the meaning of Code Ala. 1886, § 2590, subd. 1, providing that an employer is liable for injuries to an employee as if he were a stranger, when the injury is caused by any defect in the machinery used in the business of the master or employer.

In discussing what is meant by "machinery" as employed in the Act, the court said, "A machine is a piece of mechanism which, whether simple or compound, acts by a combination of mechanical parts, which serve to create or apply power to produce motion, or to increase or regulate the effect. As used in the Patent Act, it has been defined to be "a concrete thing, consisting of parts, or of certain devices or combination of devices." *Burr v. Bury*, 1 Wall. 531. Primarily, machinery means the works of a machine; the combination of the several parts to put it in motion. But we do not understand that the term was used in the statute in its primary sense, but, having a more enlarged signification, should be construed as so used, nothing appearing to show that it was intended to be used in its primary or restricted sense. Thus understood, the term "machinery" embraces all the parts and instruments intended to be and actually operated, from time to time, exclusively by force created and applied by mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of men or animals, or by water or steam, or other inanimate agency. *Seavey v. Insurance Co.*, 111 Mass. 540. The carding, spinning, and weaving machines, together with the instrumentality by which the prime motive-power is created or applied, constitute the

machinery of a cotton-mill. When cars, though used at times and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business." *Georgia Pac. R. Co. v. Brooks* (Ala.), 4 So. Rep. 289.

Employee using Machine after Notice of Repair. — Where a person operating a machine complains to the superintendent of machinery that it is defective and unsafe, and such superintendent repairs it, and tells the operative he has done so, it is not negligence for such operative to continue at work at the machine, although it afterwards appears that the repairs were not substantial. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592.

Evidence of Repairs after an Accident. — Where repairs are made upon a machine shortly after an accident has occurred at the machine, evidence of such repairs is competent, as tending to establish that it was not safe at the time of the accident. *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592.

Duty of Company to provide Foot-Boards over Open Cars. — A brakeman was injured by falling from some machinery loaded in an open car over which he had to pass. *Held*, that the jury were justified in finding that the company was negligent in not providing foot-boards over the car, and that, being so, its custom of not providing them did not relieve their responsibility. *Hosic v. Chicago, R. I. & P. R. Co.* (Iowa), 37 N. West. Rep. 953.

Injury caused by Defective Brake of which Servant was Unaware. — Plaintiff while assisting as a brakeman in making up a train by the direction or with the consent of the yard-master, who had authority to employ necessary assistants in his department, was thrown violently from the end of the train by the sudden slacking of the train, caused by the engineer in reversing the engine to arrest the speed of the train as it was running down grade, such reversal being rendered necessary because of a defect in a brake which had existed for four or five months, and was known to the foreman of the round-house, whose duty it was to repair the defect, but was not known to the plaintiff. *Held*, that the plaintiff was entitled to recover for the injuries caused by the fall. *Central Trust Co. v. Texas & St. Louis R. Co.*, 32 Fed. Rep. 448.

Injury caused by Defective Bridge. — **Degree of Care required by Company.** — Where a railroad company furnishes for its employees a temporary bridge for the passage of construction trains, and the construction of a permanent bridge therefrom, the fact that the bridge was built under a competent foreman, and competent inspectors were afterwards furnished, does not free defendant from liability to such employees for defects in the construction and repair of the bridge which the company could in the exercise of ordinary care have known of. *Bowen v. Chicago, etc., R. Co.* (Mo.), 8 S. West. Rep. 230.

Death of Brakeman caused by Absence of Handhold on Top of Car. — **Contributory Negligence.** — Where, in an action against a railroad company for damages for the death of a brakeman in its employ, it appeared that the deceased fell and was killed while attempting to climb to the top of a box freight-car by steps or bars at the end furnished for that purpose, but on the top of which car there was only an iron spike in place of the usual handhold, *held*, that — as the steps or bars on the end of the car were good, and until deceased let go of them he was safe, but if he did let go of them before he was sure of a secure grip on top of the car, the fault was his own — there was nothing in the evidence to show negligence on the part of the company, and therefore a nonsuit was properly ordered. *Fair v. Pennsylvania R. Co.* (Penn.), 12 Cent. Rep. 530.

Injury to Brakeman owing to Failure of Company to furnish Platform Lumber-Car with Proper Stakes. — Defendant delivered to one L., at a station on its road, a platform car, with knowledge that it was to be used in the transportation of lumber over its road. Upon the sides of the platform car were iron sockets for stakes or standards, which were necessary in order

to load the car. Stakes were not furnished; it being the practice of defendant to furnish lumber-cars without stakes, which were supplied by the shippers. L. put a stake in each of the sockets, and loaded the car with lumber under the direction of defendant's station agent. The car was attached to a freight-train, upon which plaintiff was employed as a brakeman. In going around a curve at a high rate of speed, one of the stakes broke; the lumber, and plaintiff, who was upon it at the time in the discharge of his duty, were thrown off, and plaintiff was injured. In an action to recover damages for the injury, it appeared that the stake was made of soft, poor wood, and was decayed, spongy, and unsound, which was apparent on inspection. It did not appear that defendant had made any rules or directions as to the inspection of such cars, and the station agent had simply general directions to see that every thing was in order, and to correct any thing he saw out of the way. If the conductor or brakeman saw a defect, they were to report it to the station agent. *Held*, that the stakes were necessary appliances forming part of the car, and defendant was chargeable with negligence in failing to exercise proper care that suitable and proper ones were furnished; also, that defendant's practice or custom was no defence, as it merely showed it had chosen to delegate to shippers a duty it should have performed itself, and that therefore defendant was liable. *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374.

Company not liable for Undiscoverable Defect in Timbers of Car, causing it to break and kill Brakeman.—In an action by plaintiff to recover damages for the death of his minor son, who was in employ of defendant as brakeman, the evidence showed that three of defendant's cars, loaded with rock, standing upon a switch, started down the track, and plaintiff's son got upon the front car, and began tightening up the brakes; that one of the cars had no brakes on it, and he did not succeed in stopping the cars before they collided with others standing lower down on the track, when the front car broke in the middle, throwing him forward, and a rock upon him, killing him instantly; that the timbers which broke were decayed and partially rotten; that the force of the collision was not sufficient to have broken them, had they been sound; and that the defect in the timbers could have been discovered by a proper inspection. *Held*, that a demurrer to this evidence was properly overruled. *Parsons v. Missouri Pac. R. Co. (Mo.)*, 6 S. West. Rep. 464.

Injury to Brakeman knocked off Car through Negligence of Co-Employees.—Yet if Defective Brake was Cause of Injury, he can recover.—*Lilly v. New York Central & H. R. R. Co.*, 107 N. Y. 566. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the following facts appeared: Plaintiff was a brakeman in defendant's employ, and was on duty at its depot in New York. An engine was moving down to take a car loaded with ashes standing on one of the tracks; plaintiff went to the rear of the car to get upon it for the purpose of attending to the brake, while a car-coupler took his position at the front of the car to couple it to the engine. The car had no step to get upon it; plaintiff was obliged to take hold of the brake-rod, and put his foot on one of the bumpers; the engine came down so rapidly that the car-coupler could not make the coupling. The force of the collision threw plaintiff from the car; he was pushed along by the brake-beam for about two hundred feet, and then the car passed over him, causing the injury complained of. Plaintiff's evidence tended to show that the brake of the ash-car was out of order so that it could not hold the car, of which defect defendant had notice; that it was customary, when cars were standing on a track, to have their brakes set for the purpose, among others, of preventing their being moved far, if struck in making up trains, collision from such a cause being of frequent occurrence; that if the brakes of this car had been in proper condition, and set tight, the car would not have been moved by such a collision more than five or ten feet. Plaintiff was nonsuited. *Held* (Earl and Finch, JJ., dissenting), that, conceding plaintiff was knocked off the

car through the negligence of his co-employees, and was so placed in a dangerous position, yet that under the circumstances it might have been found he could have extricated himself without injury if the brakes had been in proper condition, and that the defect was the proximate cause of the injury, therefore the question should have been submitted to the jury, and the nonsuit was error.

Also *held* (Earl and Finch, JJ., dissenting), that an accident of this nature might fairly and reasonably be apprehended as a possible result of a failure on the part of the defendant to keep the brakes in good condition; that the fact that no such accident had ever before happened was not conclusive in this respect, as it was not necessary to see in advance all the possibilities of danger which might result from such an omission, or to show that an exact counterpart of the accident had happened before. Defendant proved that it was the duty of all employees, when the brakes of a car standing on the track were out of order so that they could not be set, to "chock" the wheels, and claimed that the omission to do so in this case was negligence of a co-employee contributing to the injury. *Held* untenable; that the failure to have the brakes in order could, under the circumstances, be fairly alleged as the cause of the injury.

Injury to Brakeman from Defective Push-Pole.—In *Norfolk & W. R. Co. v. Jackson* (Va.), 6 S. East. Rep. 220, it was held that evidence that a "push-pole" furnished by defendant railroad for the purpose of pushing cars upon a track running parallel with the engine, while it should have been sound and strong, was in reality cross-grained and defective; that the tender lacked the usual socket in which to put the end of the pole; that the pole slipped, broke, and that the deceased involuntarily grasped the pole, and was thrown in front of the advancing tender, and was killed, — sustain a judgment for plaintiff asking damages for negligence.

"It is well settled," said the court, "that it is the duty of the railroad company, using the dangerous agency of steam, to exercise all reasonable care to provide and maintain safe, sound, and suitable machinery, roadway, structures, and instrumentalities; and the employee has the right to presume that the company has discharged these duties. His contract with the company is based on the duty and the implied understanding of the company to provide safe and adequate machinery, competent and vigilant agents. *Clark's Adm'r v. Railroad Co.*, 78 Va. 717; s. c., 18 Am. & Eng. R. R. Cas. 78; *Moon's Adm'r v. Railroad Co.*, Id. 752; s. c., 17 Am. & Eng. R. R. Cas. 531; *Railroad Co. v. McKenzie*, 81 Va. 71; *Hough v. Railroad Co.*, 100 U. S. 217; *Railroad Co. v. McDaniels*, 107 U. S. 459; s. c., 11 Am. & Eng. R. R. Cas. 158; *Railroad Co. v. Ross*, 112 U. S. 383; s. c., 17 Am. & Eng. R. R. Cas. 501; *Railroad Co. v. Herbert*, 116 U. S. 642. Applying these principles, which are well settled and familiar, we find that in this case the evidence discloses that the pieces of timber, once used for this purpose of pushing from one track across to another, had been supplanted by a push-pole provided by the company, and carried along with their other implements and utensils; that they were required to be of good, strong, and straight timber, — sometimes being required to put in motion cars weighing sixty thousand pounds; and, to keep them from slipping under this enormous pressure, iron cups or sockets were screwed upon the engine or cars to receive them, the pressure being never direct, but always at an angle; while in this case the wood used to make the push-pole in question was cross-grained and wind-shrivelled and knotty, and close to a knot a hole was bored, and a pin put through, and a cuff put in. The material was unsuitable, and, by the exercise of ordinary care on the part of the company's agent, it would have been rejected; and the manipulation of it, stated above, was negligent: and the tender was not provided with any socket or other appliance to hold the pole in place, and by this neglect the pole slipped, and caused the accident."

Accident caused by Spreading of Rails caused by Passage of Previous Train not Attributable to Negligence of Fellow-Servants.— Where the spreading of the rails caused by the passage of a previous train was the proximate cause of an accident, the defendant cannot avoid its liability by showing that the employees on the first train were guilty of negligence in not giving warning of the condition of the track in time to prevent the accident. *Gulf, Colo. & S. F. R. Co. v. Pettis* (Tex.), 7 S. W. Rep. 93.

Injury caused by Defective Handhold.— **Opinion Evidence.**— Where the plaintiff can only recover on the ground that by reasonable and ordinary care in inspecting the cars it would have been discovered that a handhold, which the decedent was compelled to use in passing over the end of the freight-car, was not securely fastened to the top of the car, it is error to ask the opinion of a witness as to the fact. *Gutridge v. Missouri Pac. R. Co.* (Mo.), 13 West. Rep. 644.

Action for Injury caused by Defective Hand-Car.— **What Evidence is Admissible under the Pleadings.**— In an action against a railroad company by an employee for personal injuries alleged to have been sustained while running a hand-car under the orders of defendant's foreman, where the only allegation of the petition as to the defective condition of defendant's hand-car which was the cause of the injury is, that a water-keg thereon was not in its proper position, evidence to show that the defective condition of the car was due to the disposition of the tools on the hand-car, is inadmissible. *Harty v. St. Louis, I. M. & S. R. Co.* (Mo.), 8 S. West. Rep. 562.

Duty of Company as to Inspection of Foreign Cars.— While it is not incumbent on the receiving company, on the receipt of a car for running over its road, to make tests to discover hidden defects in the construction, or in the materials used in the construction, still it is bound to inspect foreign cars just as it would, and is required to, inspect its own, after they have been in use. While it is not bound at all hazards to furnish safe machinery, cars, and other appliances, it is liable to servants for injuries resulting from defects which are known or ought to have been known, and where the injury could have been prevented by such care. *Gutridge v. Missouri Pac. R. Co.* (Mo.), 13 West. Rep. 644.

MELOY

v.

CHICAGO & NORTH-WESTERN R. CO.

(Iowa Supreme Court, March 12, 1888.)

Risks of Servant's Employment.— **Injury to Civil Engineer caused by Defective Road-bed.**— An injury to a civil engineer employed by a railroad company in laying track on a new line of road, caused by the derailment of a train while passing over the road to the front of operations, owing to a defective road-bed, is not a risk incident to his employment, and he is entitled to recover.

Dangerous Rate of Speed.— **Province of Jury.**— A jury, having all the facts as to the condition of the track before them, are the proper judges as to whether any rate of speed is dangerous.

Injury to Civil Engineer Riding in Tool-Car.— **Contributory Negligence.**— Although a tool-car may be a place of special danger in case of accident, owing

to its position in the train and the fact that it is somewhat out of repair, yet it is for the jury to say whether a civil engineer, in charge of track-laying, was guilty of contributory negligence in riding to his work in such a car.

Injury caused by Train Running at Dangerous Rate of Speed over Defective Track. — Evidence. — In an action to recover damages for injuries received owing to the derailment of a train, evidence to show that another train had gone over the same portion of the track alleged as defective, and at the same rate of speed, on the morning of the day before the accident, is incompetent.

APPEAL from Superior Court of Cedar Rapids.

This is an action for the recovery of damages for a personal injury sustained by the plaintiff, E. S. Meloy, while riding on a train belonging to defendant, the Chicago & North-western Railway Company. There was a verdict and judgment for plaintiff. Defendant appeals.

Hubbard, Clark, & Dawley for appellant.

Ward & Harman and *Mills & Keeler* for appellee.

REED, J. — Plaintiff is a civil engineer by profession, and at the time he received the injury he was in defendant's employ, and was engaged in superintending the work of laying track on a line of railway which defendant was building from Belle Plaine to What Cheer. The accident occurred on Sunday, Aug. 3, 1884. On the morning of that day plaintiff had returned to Belle Plaine from the front, the track having been laid to a point about thirty-five miles south of Belle Plaine. In the afternoon he was directed by the chief engineer to return to the work. A locomotive had been derailed at a point near the south end of the track, and a wrecking-train and crew were sent out to pick it up, and plaintiff was directed to return by that train. The wrecking-train proper consisted of a derrick car which was next to the locomotive, and a tool car. In the rear of these were six flat cars, loaded with steel rails and ties, and in the rear of those was an ordinary box-car, which was used as a way-car and for transporting supplies for the laborers engaged on the work. Plaintiff rode on the tool-car, which was an old caboose that had been devoted to that use. On the trip the locomotive was derailed at a point about twenty-one miles south of Belle Plaine, and in the accident the tool-car was also thrown from the track and badly broken up. Plaintiff was caught between it and the flat car in rear of it, and very severely injured, one of his limbs being crushed so badly as to render amputation necessary. A short time before the accident he was riding on the rear platform of the car; but he testified that he had gone inside before it occurred, and that when he discovered, by the motion of the car, that it was about to leave the track, he returned to the platform with the intention of jumping from it,

Facts.

and was in the act of doing so when he was caught. One of the wrecking-crew was in the car at the time, and was injured, but not seriously. The conductor of the train and a brakeman were in the way-car, but neither of them received any injury. The accident occurred in a cut. The ground at that point was wet and spongy, and drains for conducting the water away from the track had not yet been constructed; and there was evidence tending to prove that the track was in bad condition. No part of the road had been open to general business, and such trains as were run upon the track were engaged in carrying material for the construction of the road and supplies for the workmen.

The allegations of negligence are, that the track was permitted to remain in a dangerous condition, and that the train was run at a reckless and dangerous rate of speed. The jury found specially that defendant was negligent in both respects charged; also that plaintiff was not guilty of any negligence directly contributing to the injury.

1. The defendant asked the Superior Court to instruct the jury, in effect, that as plaintiff, from the nature of his employment, was required necessarily, in passing to and from his work, to ride over newly constructed track, he assumed, when he entered the service, all the risks ordinarily incident to the operation of a track in that condition; and if the accident was occasioned merely by the newness of the track and its unsettled condition, he could not recover. The Superior Court refused to give the instructions; nor did it give any on its own motion, expressing the same doctrine. The correctness of the instructions in the abstract may well be conceded. The refusal of the court to give them, however, does not afford grounds for the reversal of the judgment. It was such risks as were incident to the operation of trains upon a new track when operated in a reasonably prudent and careful manner, considering its condition, that plaintiff assumed when he entered the service. When defendant undertook to operate trains upon the track, and to carry its employees thereon, it assumed the duty of exercising reasonable care for their protection from injury while being so carried. Now, the newness of the track, the fact that it had not yet settled, that the ground at the place of the accident was wet, and that ditches had not yet been constructed to carry the water away from the track, were all matters affecting the safety of the operation of the trains, and defendant was required to exercise such diligence and care as were reasonable under those circumstances. And it was such risks as were incident to the operation of trains under such circumstances, when that degree of care was exercised in their operation, that plaintiff assumed. He did not assume the

Injury was not
risks incident
to employment.

risk of dangers which might be created by a disregard by defendant of the duty it assumed in the premises. As stated above, the jury found specially that the train was being run at a dangerous and negligent rate of speed. If that finding was fairly arrived at, the refusal of the court to give the instruction could have worked no possible prejudice to defendant ; for it determines that the accident was occasioned, not merely by the newness of the track and its unsettled condition, but by the negligent manner in which the train was being run.

2. There was evidence as to the rate of speed at which the train was running at the time. Some of the witnesses gave it as their opinion that it was running from fourteen to seventeen miles per hour, while others thought that its speed did not exceed from ten to twelve miles. There was also evidence as to the condition of the track in the cut. Two witnesses testified that they passed over the track at that point two or three hours before the accident, and that the ground under the ties was so soft and wet that they sunk under their weight when they stepped on them ; and that, while the ends of the ties on one side were kept from sinking by plank and timbers which had been placed under them, the other ends were sunken in the mud, and that the rail on that side was also sunken in the mud. Other witnesses had also seen the track before the accident, and they described it as it appeared to them. Plaintiff, however, offered no evidence as to the rate of speed at which a train like the one in question could be run with safety over a track in that condition. Nor did he attempt to prove by any direct evidence that the rate of speed at which the train was running was dangerous ; and it was contended that upon that state of the proof the court was not warranted in submitting to the jury the question whether the rate of speed was dangerous. The question, however, was in the nature of a conclusion, and was to be determined from the facts and circumstances proven, and such matters of common knowledge as might be considered without proof. That the opinions of witnesses, who from their experience or observation were specially qualified to form a correct opinion on the subject, would have been admissible in evidence, is doubtless true. But such opinions, if they had been given, would by no means have been conclusive of the question ; for it is one upon which men of intelligence, even though without special experience in the matter, might form a correct opinion when the facts and circumstances are placed before them. The jurors had some knowledge of the weight of a locomotive. They also knew something from their observation of the manner in which locomotives are moved upon the track. There are matters of common knowledge which might

Speed of train
a question for
jury.

be considered in any case in which they are of importance. With these matters, and the facts as to the speed of the train and the condition of the track, before them, they were the proper judges as to whether the rate of speed was dangerous.

3. It was proven on the trial that the car used as a tool-car was constructed of light material, and that it had been in use for a long time, and was somewhat out of repair. Also, that the derrick-car, and the flat cars which were in the rear of it in the train, were much heavier and stronger than it; so that, in case of accident, it was liable to be crushed between them. It was contended, that by reason of these facts, and the position of the car in the train, it was a place of special danger; and that plaintiff, by voluntarily going upon the car, exposed himself to that danger; and that, in doing so, he was guilty of such negligence as precludes a recovery. The Superior Court, however, ruled that the question was for the jury. It instructed, that, unless plaintiff had proven that he was in the exercise of ordinary care and diligence at the time of the accident, he was not entitled to recover; and that, in determining that question, they should consider all the circumstances of the case as they were proven, — such as the make-up of the train, the location of the tool-car in it, the fact that there was a way-car attached in which he could have ridden, and the like. The question, we think, was properly submitted to the jury. It is true, doubtless, that the tool-car was not as safe a place to ride in as the way-car at the rear of the train. Owing to the condition of the track, accidents were liable to occur to the train under the most careful management; and, in case of accident, that car was more liable to be wrecked and broken up than the way-car. It might be said, as matter of law, that plaintiff, when he chose to ride in it rather than in the way-car, exposed himself to those greater dangers, and if he had been injured in consequence of that exposure, he could not recover. But plaintiff's complaint was, that his injury was occasioned, not by dangers ordinarily incident to the operation of the train, but by the negligent manner in which it was operated, and there was evidence tending to prove that allegation. And the jury have found specially that that was the cause of the injury. The question clearly is one of fact, and it was the province of the jury to determine it. In *Martenson v. Railway Co.*, 60 Iowa, 708, 3. c., 11 Am. & Eng. R. R. Cas. 233, it was held that an employee who voluntarily rode in a position of danger upon the train, and thereby exposed himself to the particular danger which caused his injury, could not recover. But the facts of this case do not bring it within the principle of that holding. In that case the employee stood upon the oil-box, and clung to the side of the car.

Contributory
negligence
in riding in
tool-car.

while the train was in motion. While in that position, he was liable to come in contact with the platform or any other object near the track. He was struck by a running board, which, as was alleged, was negligently permitted to project from the platform, and was knocked from the car and injured. The facts which distinguish the two cases are, that, in that, the position in which the employee placed himself exposed him to the very danger which caused the injury; viz., to the danger of being knocked from the car by coming in contact with objects near the track; while in this, the injury was occasioned, not by a danger to which plaintiff exposed himself when he chose to ride in the tool-car, but by one which was created by the negligent manner in which the train was operated.

4. A train of cars passed over the track at the place of the accident at about three o'clock in the morning of the day of the accident. Defendant offered to prove by the employees who were in charge of that train that it was run at the rate of from fifteen to eighteen miles an hour, and that they saw no indications that the track at the point where the accident occurred was out of repair or in an unsafe condition; but the evidence was excluded on plaintiff's objection. If it had been shown that the track was in the same condition when each of the trains passed over it, the evidence as to the rate of speed at which the one which passed over in the morning ran would probably have been competent. But all the evidence tended to prove that it was not in the same condition. It had been repaired on the afternoon of the day before, and put in as good condition, perhaps, as was practicable. But the evidence shows, without conflict, we think, that it was in bad condition on the afternoon of the accident. The morning train passing over it probably had the effect to materially change its condition. The fact that a train which came upon it when it was in good condition was able to pass over in safety, at a given rate of speed, had no tendency to show the rate at which another train might be run with safety upon it when in an entirely different condition.

Evidence as to
other train
incompetent.

We find no prejudicial error in the rulings of the Superior Court, and the verdict appears to be supported by the evidence. The judgment will therefore be affirmed.

Risks incident to Servants' Employment. — See Indianapolis, etc., R. Co. v. Watson, and note, *ante*, p. 334.

Contributory Negligence of Engineer in running from one Track to another at High Speed in Dense Fog. — In an action by a locomotive engineer against a railroad company for personal injuries due to a collision, it appeared that the accident occurred at H. station, where a double-track road ended and a single-track extension began. About a mile south of H. on the double-track road

there was a cross-over switch running from the north-bound to the south-bound track. Plaintiff was engineer of passenger-train No. 10 going north. In clear weather it was customary, when there were freight-trains detained on the north-bound track between the switch and the station, for signals to be given by whistles from the forward engine at H. to the rear engine near the switch; and if the south-bound track was clear, No. 10 would move onto it, pass by the freight-trains, and proceed on its way on the single-track extension. In foggy weather the forward engine near H. would act as a pilot engine, running down on the south-bound track to the switch, while the conductor of the forward freight-train would remain at H. to signal any train coming south on the single-track extension. When the pilot engine passed beyond the switch, No. 10 would move on to the south-bound track. The morning when the accident occurred was extremely foggy. Engine No. 287 going north was stopped at H., and behind it several coal-trains. The operator at H. telegraphed this to the despatcher, who replied that "No. 287 should arrange to get No. 10 around." No. 287 was accordingly run onto the south-bound track, and moved down towards the cross-over switch. In the mean time No. 10 had arrived at the switch and slowed up. The conductor of the rear coal-train, who was at the switch, signalled No. 10 to come on. Plaintiff accordingly ran No. 10 onto the south-bound track, and increased his speed to fifteen or twenty miles an hour, in spite of the fog. Immediately afterwards his train collided with No. 287, and he was severely injured. The rules of the company prohibited running on the south-bound track, and also required proper signals to be sent forward in case of detention.

Held, that there was no error in entering a compulsory nonsuit. *Wert v. Keim* (Pa.), 12 Cent. Rep. 381.

Contributory Negligence of Conductor in running Train at Immoderate Rate of Speed. — In an action against a railroad company for negligently killing plaintiff's intestate, it appeared that deceased was a conductor of defendant's freight-train; that the accident occurred while deceased was running the train at an immoderate rate of speed over a bridge which was being repaired, so that it gave way. *Held*, that the company was not liable for not providing a safe track, it not appearing that the accident would have occurred if the train had been run at a proper speed. *St. Louis, I. M. & S. R. Co. v. Morgart* (Ark.), 8 S. W. Rep. 179.

Whether Failure to refuse to work with Fellow-Servant amounts to Contributory Negligence is Question for Jury. — In an action by an employee against a railroad company for injuries, it appeared that the injury was caused by the carelessness and recklessness of an engineer who, under the influence of a violent temper, was in the habit of acting recklessly to the injury of his co-employees; that the company knew of the character of the engineer; that plaintiff had been in the employ of the company with this engineer only a week. *Held*, that whether the failure of the plaintiff to refuse to work amounted to negligence on his part was a question for the jury to decide from all the circumstances of the case. *Northern Pacific R. Co. v. Mares*, 123 U. S. 710; affirming *Mares v. Northern Pacific R. Co.* (Sup. Ct. Dakota), 17 Am. & Eng. R. R. Cas. 620.

Contributory Negligence in boarding Moving Train. — It is not negligence for a section-hand to attempt to board a moving train when required to do so by order of the conductor and others in charge. *Rayburn v. Central Iowa R. Co.* (Iowa), 35 N. W. Rep. 606.

Contributory Negligence of Helper to Engine Hostler in attempting to Board Moving Engine on Right-hand Side of Cab. — Ordinarily, when an adult person solicits employment in a particular line of work, the act of solicitation is an assertion by the person seeking employment that he is competent to discharge all its ordinary duties; and it is one of the general, implied conditions of every contract for service with an adult person, that the servant is competent to

discharge the duties for which he is employed. It is the fault of the servant if he undertakes without sufficient skill, or applies less than the occasion requires. If, in the discharge of a dangerous duty, an employee of a railroad company voluntarily places himself in a dangerous position, unnecessarily, when there is another place that is safer that he could have chosen, and he has time to exercise his judgment, and injury occurs to him by reason of his choice, he cannot recover for such injury. There is a want of ordinary care in the voluntary attempt of an employee of a railroad company, discharging the duties of a helper to a hostler, to get upon a switch engine in motion by the step at the rear right-hand side of the cab of the engine, and when a safer place for him to get upon the engine would be the rear foot-board, which was used for this purpose by that class to which he belonged, and when the danger of the attempt to get upon the side step is increased by the step being obscured to some extent by the escaping of steam from the cylinder-cocks of the engine, and the dust blown up thereby. *Union Pacific R. Co. v. Estes*, 37 Kan. 715.

Contributory Negligence of Employee leaving Pay-Train while it is in Motion. — It was held in *Louisville & N. R. Co. v. Stocker*. (Tenn.), 6 S. W. Rep. 737, that for an employee of a railroad company who had boarded the pay-train to receive the amount due him for his services as such employee, and, having completed his business, to attempt to alight from the train which was then moving, is not such contributory negligence *per se* as will defeat a recovery for injuries sustained; and a charge to the jury to that effect is erroneous, as it was for the jury to determine, under the evidence, whether such acts should operate to defeat recovery, or only mitigate the damages.

Snodgrass, J., in delivering the opinion of the court, said, —

"This inquiry involves, first, the question whether, under the circumstances, the railroad company was chargeable with any less degree of care towards such an employee than it would have been towards a passenger. It is earnestly insisted, on behalf of the company, that it was not under obligation to exercise the same or unequal degree of care and diligence required in respect to a passenger. To this we cannot assent. The plaintiff was not an employee on the train; he had nothing to do with its control or operation. He was invited on board for the purpose of attending to the business for which the train was being used, and, under the circumstances, was entitled to no less care and consideration than any other person or passenger lawfully on board. The question is, then, narrowed to the limit within which it must be determined, had a passenger, impliedly invited to alight from the train while in slow motion, done so, and sustained a fall in consequence.

"It has been held in the courts of several States that such action is negligence *per se*, and that, if injury results, no damages can be recovered; but this is contrary to the current of judicial opinion in this country, at least. The true rule deducible therefrom is stated in 2 Wood, Ry. Law, 1130, to be, that, 'in all cases, the question is one of fact, whether, in view of the particular circumstances, the passenger was guilty of negligence in attempting to leave the train while it was in motion. In this, as in all other matters where the safety of the passengers is concerned, the company owes a duty to the passenger to act with proper care and caution; and if the motion of the train is not entirely stopped, and the passenger is expressly or impliedly invited to leave the train while moving at a slow rate of speed, he has a right to presume it is safe for him to do so, and the company, having virtually told him that it was safe, is estopped from saying that the passenger was guilty of doing what it had advised him to do [or, can we add, manifestly intended him to do, and hence impliedly advised him under facts of this case]. The passenger may not, in all cases, rely upon the assurance of the company in this respect, but must exercise his own judgment, where there is reason to doubt the soundness of the advice; but, as between a mere doubt and the experience and superior knowledge of the company's officers and agents, he has the right to give way to the latter,

unless the rate of speed at which the train is moving [or, we add again, his own feebleness] is such as would prevent a man of ordinary prudence from acting upon it.' 'If the train is moving slowly, and there is no *obvious* danger in getting off, it cannot be said to be negligence *per se* to make the attempt, especially if the passenger is directed to do so by the conductor or brakeman; and it would be wrong to instruct the jury that such an attempt *per se* constituted contributory negligence.' Id. 1129. 'As a rule, it may be said that where a passenger, by the wrongful act of the company, is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably.' Id. 1131, 1132.

"To the same effect are the cases cited in *Thomp. Carr.* 227-267. The earlier cases establish the rule that leaving a train in motion was such negligence as defeated the right of recovery, unless done to avoid danger of remaining on board; and this is still stated as the 'general rule' in many authorities. 2 *Wood, Ry. Law*, 1126; *Thomp. Carr.* 267. But the rule we have laid down is the modern one, and formulated from the many exceptions, and this modification has been before recognized by this court. *Railroad Co. v. Conner*, 15 *Lea*, 258.

"It will be noticed that the rule laid down in this case is in view of the fact that the deceased was impliedly invited to leave the train while moving by the act of the company's servants in starting the train as soon as they had finished the business for which they had caused him to enter it, and upon termination of which he was expected to leave. It is not hereby intended to depart from the rule, as laid down by this court in *Railroad Co. v. Massengill*, 15 *Lea*, 328, that, 'where the party injured is not induced or directed at the time, by act or word of the company's agent, to get off, and does get off, he does so at his own risk.' 'We merely hold, upon the facts of this case, that when the company has brought an employee aboard of a train to remain only until he is settled with, and for no other purpose, such business being finished, an inclination to depart is implied, and the leaving under the circumstances is to be treated as done upon the order of the company. Such being the rule, then it was not error to refuse the instruction asked."

Contributory Negligence of Conductor of Train parting on Down Grade. — Fellow-Servant with Brakeman. — A mixed train of twenty cars, run by a crew consisting of the conductor, head, middle, and rear brakemen, and engineer and fireman, parted, on a clear night, while running down a slight grade. The forward part, on which were the engineer, fireman, and head brakeman, went on some distance before the separation was discovered. The brakeman who, under the rules, had control of the detached part of the train, ordered it backed, to couple with the part left. That part had continued down grade of its own momentum. There was a collision, and the conductor was killed. At the time of the accident the rear and middle brakemen — the latter by the conductor's express orders — were in the baggage-car with the conductor. The engine gave no signals as it came back. *Held*, in an action by the heirs of the conductor, that he was guilty of negligence in not having the two brakemen at their stations, and that the head brakeman was also guilty of negligence in backing up, and that there could be no recovery, as the conductor's death had been caused by his own negligence as well as by that of his fellow-servants. *Brown v. Central Pac. R. Co.* (Cal.), 14 *Pac. Rep.* 138.

Not Contributory Negligence for Engineer to run over Switch at Eighteen Miles per Hour. — In an action for injuries to the engineer of a railroad company, caused by the derailment of the engine near a switch, the accident being caused by a spreading of the rails, it appeared that the engineer in passing the switch reduced the speed of his engine from twenty to eighteen miles per hour. *Held*, that, in the absence of any rule fixing definitely the speed at which trains

could be run over switches, the engineer was not guilty of contributory negligence. *Gulf, C. & S. F. R. R. Co. v. Pettis* (Tex.), 7 S. W. Rep. 93.

Passing over Dangerous Car in obeying Signal to set Brakes will not defeat Recovery. — A brakeman, obeying an unusual signal from engineer to set the brakes, necessarily attempted a passage, which he knew to be dangerous, over an intervening car which the conductor had told him he need not go over, and which it would have been unnecessary for him to pass over if the brake in the other car had been in working order, and fell and was injured. *Held*, that his knowledge of the danger of his attempt ought not to defeat his recovery, since it was his duty to obey orders. *Hosic v. Chicago, R. I. & P. R. Co.* (Iowa), 37 N. West. Rep. 963.

Although Step to Engine Cab is Defective, if Employee is guilty of Contributory Negligence in attempting to use it, he cannot recover. — If the rear right-hand step on the cab of a switch-engine is defective, and a person employed by the railroad company, in discharging the duties of a helper to a hostler in charge of the engine attempts to get upon such step when the engine is in motion, and when the step is partially obscured by escaping steam and dust blown up thereby; when he had no duty to perform that required him to get on at such a place, and when the rear foot-board was a safer place to get upon the engine in motion; when he deliberately chose to get upon the side step without any directions so to do; when he had adopted the plan of getting on, and riding on the side; when he was afraid to attempt to get upon the front foot-board, because the engine was going too fast, and in his attempt to get upon the side step his foot slipped off, rested on the rail, and one of the wheels of the engine so mashed and mangled it as to compel amputation of all that part of the foot in front of the ankle joint, — he cannot recover for such injury on account of the defective condition of the step. *Union Pac. R. Co. v. Estes*, 37 Kan. 715.

Injury to "Cage-Rider" in unloading Coal-Cars. — Plaintiff held Guilty of Contributory Negligence. — In *Cowley v. Winifrede R. Co.* (W. Va.), 5 S. East. Rep. 318, the defendant was a domestic corporation engaged in the business of transporting coal from certain mines on Field's Creek, in Kanawha County, to the Kanawha River, and there loading the same into barges by means of a turn-table, tiple-track, drum-house, and tiple, owned and used by the defendant company. The loaded cars of the company were first run upon the turn-table, and then turned to connect with the tiple-track, which by a down grade led to the cage where the cars are lowered to the barges. The car usually, upon the loosening of the brake, started from the turn-table by its own gravity; but sometimes force had to be applied to start it, either by pushing or pulling it, and, when it started unusually hard, by applying a crowbar in the rear behind the wheel; and when the car was started, it ran by its own gravity to the cage. It was the duty of two hands called cage-riders to take the loaded cars, one at a time, from the turn-table to the cage. In taking the loaded car to the cage, it was the duty of one of the cage-riders to get upon the car, loosen the brake, and act as brakeman on its trip to the cage; and it was the duty of the other to assist, when any assistance was necessary, in starting the car from the turn-table, and then proceed to a rope which hung suspended from a drum overhead about halfway between the turn-table and the cage, and hold the same away from the track until the car passed by, and then follow the car to the cage. This rope hung clear of the floor and about two feet to the left of the left-hand rail of the track. There were holes in the floor of the drum-house between the rails of the tiple-track; and on the outside of the track the floor was not laid close up to the rails; but there were spaces between the rails and the floor. It was sometimes the custom of the cage-riders who assisted in starting the car to do it when standing between the rails of the tiple-track in front of the car by pulling the link or coupling, and walking on the track to the rope, and then stepping out on the left of the track

and holding the rope away, and defendant's superintendent had often seen this done without remonstrance or objection; but they usually started the car from the side. The loaded cars weighed several tons. The plaintiff went into the employ of the defendant about nine months before the injury complained of, and continued therein up to the time of the injury. About the first half of that period he was engaged in taking the empty cars from the cage out onto a side-track, and for the remainder of the time he was employed as one of the cage-riders and in unloading the cars into the barges. On Aug. 14, 1883, while so employed as a cage-rider, he was injured in the manner following: The plaintiff and one Lavender, his uncle, were the two cage-riders; that Lavender took his place at the brake on a loaded car upon the turn-table, and loosened the brake; that the plaintiff assisted in starting the car by pulling at the lower left-hand corner, being the corner towards the cage, and on the same side of the track on which the rope was suspended; that directly after the car was started from the turn-table the plaintiff stepped in front of it and between the rails of the tiple-track, and proceeded to walk down the track between the rails towards the rope, and when some eight or nine feet in advance of the car, and about seventeen feet from the turn-table, he stepped with his right foot into a crack or space between the floor of the drum-house and the left-hand rail facing the cage of the tiple-track, and on the inside of said rail: that his foot was wedged in between said floor and rail so firmly that he could not extricate it; that he called to Lavender, who attempted to apply the brake, and stop the car, but was unable to do so until the car ran onto the plaintiff's foot; that when help reached him, the plaintiff was lying on the outside of the track, his right foot was on the left-hand rail, and the car had run upon his right heel; that he was taken home, and, after suffering great pain for two weeks, his leg was amputated a short distance below the knee,—it having been ascertained that his foot was so badly crushed that it did not have vitality enough to heal up, and mortification would have resulted if the amputation had not been performed; that at the place where the plaintiff was injured, the plank of the floor, between the rails of the track and next to the left-hand rail thereof, was so laid as to leave a space of three or four inches wide between said rail and plank which extended some fourteen or sixteen feet; that the said plank had been so laid before the plaintiff went into the employ of the defendant, and the location of said plank and the space between it and the rail had so continued up to the time of the injury without change, but a few days after the injury the floor at that place was relaid by the defendant so as to close said space in a large measure. And the plaintiff testified that the said spaces or cracks between the rails were known by him to be there from the time he entered the service of defendant up to the time of his injury. It was proved that with good brakes, dry track, and brake-tender all ready to apply the brake, with the brake-chain taught, the car on said track could be stopped in five or six feet; but that at the time the plaintiff was injured, Lavender, the other cage-rider, who was at the brake, did not have the brake-chain taught; that the same was loose, just as it had been unwound to allow the car to run off the turn-table, and when that was the case it would take longer to stop the car; that the brake on the car which injured the plaintiff was all right when the car was run on the turn-table, just before starting down to the cage. Also, that the plaintiff was seventeen years of age when he was injured, and that his father and next friend in this action worked for defendant about said drum-house during the whole time the plaintiff was in the employment of the defendant. All these facts were proved on behalf of the plaintiff. The following facts, none of which are in conflict with any of the plaintiff's evidence, were proved by the defendant: It was not necessary for the plaintiff, in the discharge of his duties, to get in front of the loaded car or between the rails of the track; that it was the safe and prudent way to assist in starting the car by pushing in the rear or at the side of the

car, and then proceed to the rope by walking down on the left-hand side of the track and on the outside of it; that when the cage-driver thus assisted in starting the car, the most direct way to the rope was down the left-hand side of the track; that there was a safe and good walk from the outer table to the rope on the left-hand side of the track, and outside of the same; that the floor of the drum-house where the plaintiff was injured, and during the time of his employment, was safe and substantial, and in as good condition as floors of drum-houses or tiples of coal operators on the Kanawha generally, and that it was necessary to leave a space between the floor and the rails of the track, so that dirt and *débris* upon the floor would not obstruct the wheels of the car; that the outer edge of the flange of the car-wheel ran only about one-fourth of an inch above the floor, and if the floor were tight immediately under the flange, the car would be constantly obstructed by lumps of coal, dirt, etc., upon the floor. The foregoing were all the material facts proved by the evidence.

The court referred to the case of *Riley v. Railway Co.*, 27 W. Va. 145, and said, "This decision, it seems to me, is conclusive of the case before us. The facts in this case are much stronger against the plaintiff than they were in that case. There the plaintiff was not engaged in his ordinary duties, but in an emergency was acting temporarily as brakeman, and could not be supposed to be as well informed as to the dangers of that service as if it had been his ordinary work. Here the plaintiff had been engaged as cage-driver for over four months, and testifies that he knew all about its dangers. There was a good and safe way along the side of the double track for him to pass from the turn-table to the rope, and that was his most direct way to the rope. But instead of taking this route, and passing along the outside of the track and away from all danger, he, knowing the unsafe condition of the floor between the rails of the track, chose to go out of his way in order to get in front of the car and pass along the track between the rails to the rope. There was not a particle of evidence, then, tending to show that there was any emergency or necessity for him to do this. In doing so he was guilty of gross negligence, and this negligence was the direct cause of his injury. There was no evidence to show that the company was guilty of any default either in the construction of its drum-house or railroad track. The opening between the floor and the rail, in which the foot of the plaintiff was caught, seems to have been necessary to prevent the obstruction of the track by the accumulation of coal, dirt, etc. But, be this as it may, the duties of the plaintiff did not require him to pass over this space. If he had used the least care, or if he had not acted most recklessly, the defects in the drum-house floor, if there were any, could not have been the cause of his injury. It is not claimed that there was any fault or defect in the car or the brake, or the efficiency of Lavender, the other cage-rider. If it be true that Lavender was negligent in not having his brake-chain wound up taught, so that he might stop the car in the least possible time, this was the negligence of the plaintiff's co-servant, and for which the defendant is not responsible. The plaintiff and Lavender were in precisely the same grade of employment, and were co-servants in the most restricted sense of that term. *Wood, Mast. & Serv. sect. 435; Madden v. Railway Co.*, 28 W. Va. 610. This case is in some respects very much like the case of *Downey v. Railway Co.*, 28 W. Va. 732, in which we held as a question of law the plaintiff was guilty of contributory negligence. For the reasons before stated I am clearly of opinion, that, according to the facts proved, the plaintiff here was guilty of contributory negligence, and that the verdict of the jury was not warranted by the evidence."

Whether Injury was caused by Negligence of Train Despatcher or Conductor. — Conductor's Disregard of Signals. — In an action brought by an injured employee of a railroad company to recover for personal injuries caused by a collision between two trains upon a railroad in Missouri, where the rule of the common law as to the relation of master and servant is in force, the

issue was whether the collision occurred by the negligence of the train despatcher, or the conductor, who was a fellow-servant of the injured employee. Upon the trial there was evidence tending to show negligence on the part of the conductor in disregarding signals carried by the train he was to meet, and that his train collided with the second section of another train on account of his misunderstanding the words of the conductor, as his train was passing. *Held*, that the railroad company was entitled to an instruction to the jury that the conductor had no right to disregard his orders and the directions conveyed to him by the signals, on account of the information he supposed he was receiving from the conductor of the meeting train. *Hannibal & St. Jo. R. Co. v. Kanaley* (Kan.), 17 Pac. Rep. 324.

LOUISVILLE, NEW ALBANY, & CHICAGO R. Co.

v.

WRIGHT.

(*Indiana Supreme Court, March 23, 1888.*)

Injury to Brakeman caused by Low Bridge.—Assumption of Risk.—A brakeman who, on a dark night, is knocked off the top of a car, while in the discharge of his duties, by a low overhead bridge of which he had neither knowledge nor notice of its dangerous character, is entitled to recover against the railroad company for the injuries he received; such injury not being one of the risks assumed by him when he entered its employment.

Same.—Evidence as to Construction of Bridges on other Roads.—In an action by a brakeman for injuries received from being struck by a low overhead bridge, it is not erroneous to exclude evidence that there are bridges on all other railroads in the United States too low for brakemen standing upon the top of ordinary box cars to pass under in safety.

Same.—Evidence as to other Injuries caused by same Bridge.—In such an action it is not erroneous to permit a witness to state, that, prior to the plaintiff's injury, three persons were there injured in the same manner; such evidence tending to show notice to the company of the dangerous condition of the bridge.

Letter proposing a Compromise not Admissible in Evidence.—A portion of a letter written by the injured servant before commencing action against a railroad company to an officer of such company, containing an offer to compromise, but which contained no statement which could be separated from the offer to compromise, and still convey the idea which was in the writer's mind, was correctly excluded when offered in evidence.

Personal Injury.—Evidence.—Opinion of Physician.—A doctor having been at the time of the trial a practising physician and surgeon for more than two years, but who had not attended plaintiff continuously up to the time of trial, is competent to give evidence as to the probable result of his injuries.

APPEAL from Circuit Court, Jasper County; Peter H. Ward, Judge.

Action by Warren Wright, plaintiff and appellee, to recover damages for personal injuries against the Louisville, New Albany,

& Chicago Railway Company. Verdict for plaintiff; damages, \$10,000. Defendant appealed.

W. P. Adkinson, J. P. Wright, and E. P. Hammond for appellee.

W. F. Stillwell, George W. Friedley, and George W. Easley for appellant.

ZOLLARS, J. — It is charged in the complaint, that near Putnamville the track of the railroad is laid in a deep cut, over which is a bridge upon a public highway; that the railroad company negligently constructed, and has negligently maintained, the bridge so low as not to afford sufficient space to allow brakemen walking or standing upon freight cars, in the discharge of their duty in the management of trains, to pass under it with safety; that the railway company could and should have so constructed the bridge that brakemen could thus pass under it in safety; that it had full knowledge that the bridge was dangerous to its brakemen operating its trains; that it negligently failed to place upon or about the bridge lights or other danger signals in common use with well-managed railways to warn brakemen of the danger. It is further alleged that on, and for a short time prior to, Jan. 13, 1882, appellee was engaged in the service of the railway company as a brakeman upon a freight-train which passed back and forth over the road, under the bridge, and that, with full knowledge of the dangerous condition of the bridge, the railway company negligently failed to notify him of the danger. That when the train upon which he was engaged as a brakeman was approaching the bridge, at about three o'clock A.M. of Jan. 13, 1882, and when the rain was falling, and a heavy fog and intense darkness covered every thing so that appellee could not see or determine what point the train was passing or approaching, and being unacquainted with that part of the railway, and not knowing that the train was approaching a dangerous bridge, appellee obeyed a call to brakes made by the engineer in charge of the engine, and went upon the top of the cars to set the brakes, as it was his duty to do as such brakeman, and that while setting the brakes the train passed under the bridge, which, without any fault or negligence on his part, was brought in contact with the back part of his head with such force as to fracture his skull, thereby rendering him unconscious for weeks; causing him great suffering, both physical and mental, so as to impair his mind; causing paralysis of his right side, and thus rendering him a cripple for life; so that he is, and will continue to be, unable to make a living by manual or mental labor. The complaint closes with a general charge that all of

the injuries were the result of negligence on the part of the railway company, and without negligence on the part of appellee.

A motion was made below for an order upon appellee to make the complaint more specific. The motion was overruled. We have considered the arguments of counsel in support of the motion, but do not think that the matter is of sufficient importance to require more than a statement, that, whether the ruling of the court below was right or wrong, no substantial injury could result to appellant.

The court below overruled a demurrer to the complaint, and also a motion by appellant for judgment in its favor upon the answers of the jury to the interrogatories submitted by its counsel. Those rulings are assigned as errors. They may be considered together. The substance of the answers of the jury to the interrogatories, so far as material, are as follows: At the time of the injury to appellee the railway company was maintaining, and for seven years prior thereto had maintained, an overhead bridge upon a highway crossing its track a short distance south of the town of Putnamville. The distance from the top of the rails upon the track to the bridge above was and is 15 feet and 9 inches. The box freight-cars used by appellant were 11 feet high. Neither appellee nor any other full-grown man could walk or stand erect upon the top of such box cars passing upon the track under the bridge without coming in contact with it. The only way in which appellee could have passed under the bridge in safety, when upon the top of such box cars, was to sit down or stoop very low. He could neither sit down nor stoop low enough to escape danger and at the same time apply the brakes. The railway company neither erected nor maintained any danger signals to warn brakemen of the approach to or nearness of the bridge. By reason of the lowness of the bridge and the lack of danger signals, the service of a brakeman upon appellant's freight-trains over that part of its road was a hazardous and dangerous service; and that fact, and all other facts in relation to the bridge, were known to the railway company before and at the time it employed appellee as a brakeman, and at the time he was injured. Previous to his employment upon appellant's road, appellee had had about one month's experience as a brakeman upon the Ohio & Mississippi Railroad. He was first employed by appellant on the fifth day of October, 1881, as a brakeman upon a freight-train, his run being from New Albany to Greencastle, and continued in the service until the fourth day of November, 1881. That run carried him under the bridge in question. During that employment he passed with his train under the bridge from eight to ten times in the daytime, and the same number of times in the night. Subsequently, and on

the eleventh or twelfth day of January, 1882, appellee was again employed by the railway company as a head brakeman to assist in operating freight-trains ; his run, as before, being from New Albany to Greencastle, and under the low bridge. From his first employment up to the time of his injury he had passed under the bridge from seventeen to twenty times, one-half of the number being in the night-time. At no time previous to his injury did he know that the bridge was too low to allow him to pass under it with safety when standing or walking upon the box cars in attending to the brakes. He had no knowledge that the service was a hazardous one by reason of the low bridge, and was not notified of that fact, nor of any fact as connected with the bridge, either by the railroad company or any other person. The jury further answered, that prior to his injury appellee did not have an opportunity to know that the bridge was too low to allow him to pass under it with safety when standing or walking upon the top of freight-cars. They also answered, that he made no effort to ascertain the height of the bridge, or whether or not he could with safety pass under it when upon the top of box cars attending to the brakes. They further answered, that the danger of brakemen being struck by the bridge was an open and obvious one in the daytime, but not at night. They still further answered, that during the time appellee was in the employ of the railway company he could not, by an ordinarily careful use of the opportunities afforded him, have discovered that the bridge was so low as to be dangerous. On the morning of the thirteenth day of January, 1882, when it was yet dark, appellee started with his train, south from the Greencastle junction, towards New Albany. He knew that the first station south was Putnamville, and that the bridge in question was near to and south of the station ; but he did not know of the danger. When within about one-third of a mile of Putnamville, the engineer, by the use of the steam-whistle, called for the setting of brakes. In obedience to that call, appellee went upon the top of the cars, and moved from the front towards the rear end of the train until he reached the brake. The train was moving over a down grade, and did not stop at Putnamville, but passed through and under the bridge, some 1,500 feet south ; the engineer not having shut off the steam soon enough to stop the train at the station. As the train passed under the bridge, appellee being at the brake in a stooping posture, and his face towards the rear of the train, the bridge struck him upon the back of the head, about one and one-half inches from the top. When called upon the top of the cars, appellee, because of the darkness, did not know what portion of the road the train was passing over. When the train was passing through Putnamville he was not aware of the fact, and when injured did

not know that the train was near the bridge. After going upon the top of the cars he did not look in the direction in which the train was moving, and could not have seen the bridge had he looked, because of the darkness. Appellee could not, by the use of ordinary care and diligence, have avoided the injury. In support of the motion for judgment in favor of the railway company upon the above answers to the interrogatories, its counsel argue, that, upon the facts disclosed, it must be presumed and concluded as a matter of law that appellee contracted with the company with reference to the hazardous nature of the service, and that therefore he cannot recover. The objections urged to the complaint, as we gather from the argument, are: *First*, that no facts are alleged showing that the railway company was under a duty to erect or maintain any other or different bridge from that in question; *second*, that no facts are averred showing that it was the duty of the railway company to have warned appellee of the danger, because the danger was, in its nature, open and obvious; *third*, that it is not shown by the averments of the complaint that appellee's ignorance of the lowness of the bridge was not the result of want of ordinary care on his part; *fourth*, that no facts are averred showing that the bridge was not built in the usual and ordinary way, and of the usual, ordinary height; and, *fifth*, that it is not averred that appellee did not know that the bridge was dangerous by reason of being too low for a brakeman to pass safely under it, when standing or walking upon the top of box cars.

We think that the complaint sufficiently shows that appellee had no knowledge of the dangerous condition of the bridge. We

**Injury from
low bridge.
Negligence of
company.
Employee did
not assume
risk.**

think, too, that the complaint sufficiently shows that appellee's ignorance of the condition of the bridge was not the result of his own negligence. There is also a broad averment in the complaint that appellee received the injury without any negligence on his part. See *Town of Rushville v. Adams*, 107 Ind. 475, and cases there cited. He was required to observe ordinary care for his own safety; but he was not required to go over the road upon a tour of inspection, looking for defective bridges and faulty track, before engaging in the service. Because of its duty to him, appellee had the right to assume that the railway company had constructed and maintained its roadway and bridges in such a manner and condition, that, as a brakeman upon its trains, he could perform his duties with reasonable safety, and that, if there was any such danger to be encountered in the service as the low bridge, he would be warned of it. In the case of *Boyce v. Fitzpatrick*, 80 Ind. 526-529, commenting upon cases cited, it was said, "These cases show that while a

servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to assume that all reasonable attention will be given by his employer to his safety, and that he shall not be carelessly and needlessly exposed to risks which might be avoided by ordinary care and precaution on the part of his employer." See also *Rogers v. Overton*, 87 Ind. 410, 413. In the recent case of *Railway Co. v. Adams*, 105 Ind. 151, 161, s. c., 23 Am. & Eng. R. R. Cas. 408, this court said, that as a general rule, in the contract of hiring, there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery, and appliances for the conducting of the business safely. In the recent case of *Railroad Co. v. Rowan*, 104 Ind. 88, 93, s. c., 23 Am. & Eng. R. R. Cas. 390, in speaking of low bridges in a case in all essentials like that before us, and after citing the cases *pro* and *con*, it was said, "It seems to us that a railroad company is, and ought to be, required to construct and maintain its roadway and appendages and its overhead structures in such a manner and condition that its employee or servant can do and perform all the labors and duties required of him with reasonable safety." See the cases there cited. See also *Car Co. v. Parker*, 100 Ind. 181; *Umback v. Railway Co.*, 83 Ind. 191; s. c., 8 Am. & Eng. R. R. Cas. 98; *Railway Co. v. Orr*, 84 Ind. 50; s. c., 8 Am. & Eng. R. R. Cas. 94; *Engine Works v. Randall*, 100 Ind. 293. In the case of *Railway Co. v. Love*, 10 Ind. 554, in speaking of the duty of the master to furnish a safe roadway, and to inform the servant of unusual dangers, it was said, "If a defect existed in the road which was known to the company, but which it was impossible for them to immediately remove or remedy, and in consequence thereof the road was unsafe but not impassable, and yet they should place an employee upon the road, and suffer him, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a liability." See also *Thayer v. Railway Co.*, 22 Ind. 26. In the case of *Baxter v. Roberts*, 44 Cal. 188, 13 Amer. Rep. 160, it was said, "That one contracting to perform labor or render service thereby takes upon himself such risks, and only such, as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is, from extraneous causes known to him, hazardous or dangerous to a degree beyond that which it fairly imparts, or is understood by the employee to be, he is bound to inform the latter of the fact, or put him in possession of such information. These general principles of law are elementary, and firmly settled," etc. The facts in the case of *Railway Co. v. Welch*, 52 Ill. 183, in brief, were these: The rail-

road track at Mendota was about eighteen inches from the edge of an awning which projected from the station-house; so that, when a freight-car stood upon the track, the inside edge of the car was about even with the outer edge of the awning. The awning was about eighteen inches higher than the car. There being a signal for brakes, the plaintiff in the case, a brakeman, ran upon the ladder on the side of a car, and, before reaching the roof, was struck by the awning, and injured. It was insisted, in behalf of the railway company, that there could be no recovery, for the reason that the brakeman had assumed the risks incident to the service, and had an opportunity to know of the danger from the awning. In answer to that contention, the court said, "There are many freight depots and station-houses upon the line of the Central Railway; and it would be preposterous in us to say, or ask a jury to say, that a brakeman engaging in the service of the company must be held to know whether or not there may be one among them whose roof or awning so projects over the line of road that a brakeman on a freight-train, in the performance of his duties, would be liable to be swept from the train by a collision with it. We held in *Railway Co. v. Sweet*, 45 Ill. 201, that the corporation is bound to furnish to its servants safe materials and structures, and must, in the first instance, properly construct its road, with all its necessary appurtenances. This, of course, includes the obligation to keep in proper repair. When the appellee entered the service of this company, he had a right to presume that it had, in these respects, discharged its obligations. The ordinary perils of railroad life he of course assumed, and also any special dangers arising from the peculiar condition of the road, so far as he knew of their existence. . . . But it would have been morally impossible for him to have ascertained the existence of all such special perils as this which caused the injury; and there is no reason for supposing that he had acquired such knowledge before the accident, as he had been but two months upon the road, and had always passed the station where he was injured in the night, except upon two trips. Moreover, it is to be remarked that the danger was of such a character that it might well escape the observation of a person who had been even for a longer time upon the road." In Mr. Wood's work on *Railway Law*, vol. 3, at pp. 1480, 1481, in speaking of low bridges and the cases in which it was held that the railway company was not liable, says "that the doctrine of those cases proceeds upon the ground that the servant knew of the hazard, and therefore assumed the risk incident to it, and that the master will be liable where the circumstances are such that the servant cannot be charged with such knowledge." As it is the duty of the master to inform his servant of increased

danger and hazard created by him in the change of machinery or premises, unless the servant has notice, or the change and increased danger are so apparent that he ought to take notice, so, where there are dangers and hazards known to the master, or of which he ought to have knowledge by the use of ordinary care, and which are not ordinarily and usually incident to the business, he should inform the servant of such danger when hiring him, unless the danger is so apparent that the servant will be bound to take notice of it. *Hawkins v. Johnson*, 105 Ind. 29, 35; *Railway Co. v. Adams*, 105 Ind. 151, 165; s. c., 23 Am. & Eng. R. R. Cas. 408; *Bradbury v. Goodwin*, 108 Ind. 286.

A person contracting to work upon a railway as a brakeman assumes the risks ordinarily and properly incident to such service; but he does not, by such hiring, assume the risk of unusual dangers of which he has no knowledge, or of which he is not bound to take notice. It cannot be said here, that, by the contract of hiring, appellee assumed the risk of injury from the bridge by which he was injured. Clearly, it ought not to be said that the railway company was under no duty to build and maintain the bridge in a different manner and condition from what it did. It is charged in the complaint, and shown by the answers of the jury to the interrogatories, that the railway company was guilty of negligence, both in the building and maintenance of the bridge. It is charged in the complaint, that it was so low that a brakeman, in the discharge of his duty in setting brakes, could not, without injury, walk or stand upon the top of the cars. It is shown by the answers of the jury to the interrogatories, that from the top of the rails to the bridge was fifteen feet and nine inches, and that the box cars were eleven feet high, thus leaving a space of four feet and nine inches only between the top of the cars and the bridge. To say that a railway company had performed its whole duty when it erects and maintains such a bridge is, in effect, to say that it may abandon all reasonable care for the safety of its brakemen upon its trains. At best, that service is hazardous enough. Surely the railway companies should not increase the danger by the erection and maintenance of such low bridges. All reasonable precautions ought to be taken to decrease the danger as much as possible. There can be no sufficient reason for a holding, that, while the railway company must exercise reasonable care to provide a safe roadway and bridges below, it may abandon, to a large extent, all care as to bridges above. Called, as they often are, to their brakes upon the top of the train in rainy and dark nights, when they have no means of determining exactly the portion of the road over which the train is passing, it might be expected that the brakemen will be injured by collisions with bridges such as that described in

the complaint and the answers of the jury to the interrogatories. Assuming that railway companies perform the duties which they owe to their employees, it cannot be conceded that the bridge in question was built of the usual and ordinary height. There is nothing in the complaint, or the answers of the jury to the interrogatories, showing, or tending to show, that it is a usual or customary thing for railway companies to build and maintain overhead bridges so low as that which caused the injury to appellee. It is shown that appellee had no knowledge of the condition of the bridge, and that his want of knowledge was not the result of negligence on his part. Because of his want of knowledge, and the increased and unusual hazard caused by the lowness of the bridge, it cannot be said that appellee voluntarily assumed the risk of injury therefrom. Both the demurrer to the complaint, and the motion for judgment in favor of appellant upon the interrogatories, were properly overruled.

In answer to their contention that the bill of exceptions is not in the record because the rendition of the judgment and the approval of an appeal bond intervened between the overruling of the motion for a new trial and the giving of time within which to file a bill of exceptions, we refer appellee's counsel to the recent case of *Kopelke v. Kopelke*, 112 Ind. 435.

Appellant's counsel offered to prove that there are bridges on all railways in the United States too low for brakemen, standing or walking upon the top of ordinary box cars, to pass under with safety. The court below did not err in excluding the evidence. As we have seen, a railway company falls short of its duty if it constructs overhead bridges so low as to be dangerous to its brakemen in the discharge of their duties. If such bridges are constructed, it is the duty of the company to notify its brakemen of the danger, unless they already have knowledge, or the circumstances are such that they are bound to take notice. That other companies may have neglected their duty, and built and maintained low and dangerous bridges, cannot exonerate, or tend to exonerate, appellant for liability. There may be some such bridges upon other roads, but there was no offer to prove that they are in such general use as to be an ordinary and usual incident of the service of brakemen. Here appellee had had but two months' experience as a brakeman, and had no knowledge of the low bridge. The fact that other railroad companies may have maintained some of their bridges so low as to be dangerous, is not sufficient to charge appellee with notice here. If such low bridges are thus maintained, they are surely the exception, and not the rule. See *Railway Co. v. Pedigo*, 108 Ind. 481; s. c., 27 Am. & Eng. R. R. Cas. 310.

Evidence as to
low bridges on
all other rail-
ways.

Appellant's counsel first offered to introduce in evidence a letter, and, second, a portion of a letter, written by appellee to an officer of the railway company before this action was commenced. It is earnestly insisted that the court erred in excluding the letter and the portion thus offered. The letter was written in answer to one received by appellee. It is well settled, that an offer or proposition for a compromise of a legal controversy, not accepted, is not competent evidence for or against either party. *Board, etc., v. Verbarg*, 63 Ind. 107; *Dailey v. Coons*, 64 Ind. 545. It is also settled, that an admission of an independent fact, in no way connected with the offer of compromise, although made during the negotiations, is competent evidence. In the case of *Wilt v. Bird*, 7 Blackf. 258, it was said, "An offer, concession, or admission made in the course of an ineffectual treaty of compromise, and constituting in itself the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point." An admission of a fact not made simply because it is a fact, but expressly or clearly for the sake of, and as a part of, an attempted compromise, is not competent evidence in a subsequent action against the party making it. *Cates v. Kellogg*, 9 Ind. 507. And so, if an admission is made, not simply because it is a fact, but to open the way to a compromise, it is not admissible. *Binford v. Young*, *ante*, 142 (present term). That the letter, as a whole, constituted an offer of compromise, is not questioned. We have examined the letter carefully, and are fully persuaded that no portion of it is competent evidence in this action against appellee. It is very apparent that nothing was admitted as an independent fact simply because it was a fact, if, indeed, it can be said that there is any admission or statement that could in any way be beneficial to appellant. On the other hand, it seems very clear to us that all that was written was by way of argument for the purpose of bringing about an adjustment to avoid litigation. The whole letter had that single object in view; and, as said in the case of *Insurance Co. v. Warehouse Co.*, 93 U.S. 527 (548), in speaking of an offer to introduce a portion of a letter written with the object of effecting a compromise, "It contains no statement which can be separated from the offer, and convey the idea which was in the writer's mind."

Dr. S. W. Yost, at the time of the trial, had been a practising physician and surgeon for more than twenty years. *Prima facie*, at least, that rendered him competent to give an opinion as to the probable result of appellee's injuries. He had attended him as

physician for some two months after he was injured, at which time he was also in the employ of the railway company as surgeon.

Opinion of physician as to result of injuries. After stating in detail appellee's condition, and the character and condition of his wounds at the time he attended him, he was allowed to state that the probabilities are, that he will never, to any great extent,

be able to perform manual or mental labor without a removal of a depressed portion of the bone which was and is pressing upon the brain, by reason of the wound upon the head, and that such an operation would be fraught with great danger. It was competent for Dr. Yost to give his opinion as to the probable results of appellee's injuries. *Turnpike Co. v. Andrews*, 102 Ind. 139, 145; *Railway Co. v. Wood*, 14 N. E. Rep. 572; *Railway Co. v. Fabrey*, 104 Ind. 409; *City of Fort Wayne v. Coombs*, 107 Ind. 75; s. c., 13 Am. & Eng. Corp. Cas. 469. His evidence in that regard was not incompetent because he had not attended appellee continuously up to the time of the trial. He could state his opinion, based upon his knowledge and observation at the time he attended appellee. Had he attended him continuously, his testimony might have been of more weight, but it would have been no more competent.

Objections were made below, and are urged here, to the testimony of Dr. Harry L. Taylor. He had been a physician and surgeon since 1872, and at the time of the trial was a professor in the Indiana Eclectic Medical College. *Prima facie*, he was competent to give an opinion as to the probable results of the fracture of appellee's skull. Dr. Yost had given a detailed statement of appellee's condition for two months after he had received the injury. An hypothetical question, involving the facts as stated by him, was propounded to Dr. Taylor, and upon that he was allowed to give his opinion as to the probable results of the injuries. The testimony of Dr. Yost as to appellee's condition at the time he attended and treated him was competent evidence in the case, and hence it was competent to embody the facts so given in an hypothetical question to Dr. Taylor. Here, again, the testimony of Dr. Taylor was competent, although it might have been of more weight and importance had it been based upon an hypothetical question embodying the facts as to appellee's condition at the time of the trial.

With a description of the locality, the height of the bridge, and a statement that no danger signals were kept at the bridge, John

Evidence as to other accidents at bridges. B. Cooper was allowed to state, that, prior to the injury to appellee, three persons, giving their names, being upon the top of moving trains, were injured and crippled by coming in contact with the bridge, some of whom died from the effects of the injuries. There is some

conflict in the authorities ; but under our cases, supported by many others, the evidence was competent, as tending to show notice on the part of the railway company that the bridge was dangerous. It would not be profitable here to do more than cite the cases. See *City of Delphi v. Lowery*, 74 Ind. 520, 523, and cases there cited ; *Railroad Co. v. Newell*, 104 Ind. 264 ; s. c., 23 Am. & Eng. R. R. Cas. 492 ; *City of Fort Wayne v. Coombs*, *supra*.

The arguments by appellant's counsel upon the instructions given and refused are elaborate, and such as to challenge careful consideration, were the instructions in the record.

We are met, however, with the contention on the part of appellee's counsel that the instructions are not in the record, for the reason that the record contains no evidence that they were ever filed. They are not embodied in a bill of exceptions. The clerk has copied instructions into the transcript ; but, as contended by appellee's counsel, there is nothing to show that they were ever filed, and hence cannot be regarded as a part of the record. As said in the case of *O'Donald v. Constant*, 82 Ind. 212, "The transcript contains no copy of the clerk's notation of the filing, nor any recital that they were filed." Not being a part of the record, the instructions found in the transcript cannot be considered by this court. To bring instructions into the record without a bill of exceptions, the statute imperatively requires that they shall be signed by the judge, and filed. That they must be thus filed is a rule of practice established by the Legislature, which this court could not change if such a change were desired. See Rev. St. 1881, § 533, cl. 6. *Supreme Lodge v. Johnson*, 78 Ind. 110 ; *Elliott v. Russell*, 92 Ind. 526, and cases there cited ; *Olds v. Deckman*, 98 Ind. 162, and cases there cited ; *Landwerlen v. Wheeler*, 106 Ind. 523 ; *Childers v. Callender*, 108 Ind. 394 ; *Railway Co. v. Beyerle*, 110 Ind. 100.

It is further contended by counsel for appellant, that the verdict and judgment are not supported by sufficient evidence, and are contrary to law. It may be said that it was possible for appellee, while in the employ of the railway company, to have discovered that the bridge was dangerous. He, however, testified positively that he did not know that it was dangerous ; and the other facts stated by him and other witnesses are not such as to justify this court in holding, as a matter of law, that he was bound to take notice, and exercise the necessary precautions, having such notice, to avoid injury. Nor can this court, considering all of the evidence in the case, say that the judgment for \$10,000 is excessive. Judgment affirmed, with costs.

Risks assumed by Servant as Incident to Employment. — See Indianapolis, etc., R. Co. *v.* Watson, and note, *ante*, p. 334.

Injury to Train-Men from colliding with Bridge Trusses and Timbers. — See Gray *v.* New York, etc., R. Co., 29 Am. & Eng. R. R. Cas. 486; Baltimore & O. R. Co. *v.* Rowan, and note, 23 Ib. 390; Riley *v.* Conn. River R. Co., 15 Ib. 181; Clark *v.* Richmond, etc., R. Co., 18 Ib. 78; Sweeny *v.* Chicago, etc., R. Co., 20 Ib. 268; Hooper *v.* Columbia & G. R. Co., 28 Ib. 433; note, 28 Ib. 555; note, 26 Ib. 351; note, 24 Ib. 458.

This question was also brought before the Supreme Court of Kansas recently in St. Louis, Fort Scott, & Wichita R. Co., 37 Kan. 701, which was an action by a conductor of a freight-train for injuries received while in the service of a company. It was shown that while engaged in the performance of duty on the top of a car, and while the train was passing through a bridge, he collided with the overhead timbers, some of the braces of which were not sufficiently high to clear a man's head when standing erect on the top of an ordinary car, and thereby suffered the injuries complained of. The court *held* that, the company having knowledge, and the conductor not knowing, nor having reasonable opportunity to know, of the defect, a liability arises against the company, and in favor of the conductor, for the injuries sustained.

Judge Johnston, in delivering the opinion of the court, said, "With reference to such structures, Mr. Beach, in his work on 'Contributory Negligence,' p. 364, says, 'If the roof or overhead structure of the bridge is so low that it will strike a brakeman standing erect upon the top of his train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building and maintaining these man-traps.' The same question was before the Supreme Court of Indiana, where a brakeman was swept from the top of a freight train by a low bridge, and severely injured. He had no knowledge that the bridge was low, or that it would interfere with the performance of his duty on top of the train while passing through. It was there urged that the defect, if any, was open and obvious, the dangerous character of which he had opportunity to ascertain, and the risk of which he assumed. The court ruled that it was the duty of the railroad company to construct and maintain its roadway and overhead structures in such a condition that an employee can perform all the duties required of him with reasonable safety; and as the bridge was insufficient in height, of which fact the employee had no knowledge, the injury was the result of the company's negligence, and for which the employee was entitled to recover. The court referred to the cases relied on by the railroad company in the present case, but refused to follow them. Railroad Co. *v.* Rowan, 104 Ind. 88, 23 Am. & Eng. R. R. Cas. 390. Railroad Co. *v.* Swett, 45 Ill. 197, was an action to recover damages for causing the death of a fireman. The train on which he was working was precipitated through a bridge which was defectively constructed and maintained, and he was immediately killed. The court, in speaking of the duty of the company, and the peril which the employee assumed when he entered its service, said, 'The peril consisted in the defective construction of the road and its appurtenances, its culverts and bridges, which the fireman could know nothing about, and which he could not have discovered by the exercise of ordinary precaution and prudence. Indeed, he was not required to know any thing about that; the implied undertaking of his employers that the road and culverts and bridges were properly constructed, and safe for the passage of trains, was sufficient for him. He embarked in the service on the faith that it was a properly constructed road, and that his superiors were in the exercise of all the diligence necessary to keep it in good repair. . . . There is no rule better settled than this: that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair, and so watched and tended, as to insure the safety of all who

may lawfully be upon them, whether passenger or servants or others. They are bound to furnish a safe road, and sufficient and safe machinery and cars. For their failure in this, and their employees not knowing the defects, and not contracting with express reference to them, the companies must be held liable for such injuries as their employees may suffer thereby.' The same doctrine was announced in *Illinois Railroad Co. v. Welch*, 52 Ill. 183, where the plaintiff was injured, while in the discharge of his duties as brakeman of a freight-train, by an awning projecting from a station-house to a dangerous position, and which knocked him from the top of a car while engaged in the discharge of his duty. It was held that this was such negligence as made the company liable for the damages sustained. *Railroad Co. v. Russell*, 91 Ill. 298, was a case where a railroad company permitted a telegraph pole to stand for a period of three years so near to a side track that it was within eighteen inches of passing freight-trains, so that a brakeman in descending from the top of a freight-car while in motion, in the performance of his duty, came in collision with the pole, and was thrown from the car and killed. It was held to be culpable negligence in the railroad company to permit, for so long a time, such an obstruction to be in such close proximity to its track. *Railroad Co. v. Johnson*, 4 N. E. Rep. 381, was an action to recover for a personal injury suffered by a brakeman on a freight-train while passing through a covered bridge. In affirming a judgment in favor of the brakeman, the court approved of an instruction to the effect that, where a railroad company constructs a bridge along the line of its road, it should build it of sufficient height so that persons employed by the railroad company as brakemen, and who are required to go upon the top of freight-cars, in discharging their duty as brakemen, while going through a bridge, may pass through and under the bridge without danger to their personal safety; and that the law does not require of a brakeman that he should absolutely know all the defects of construction, and all the obstructions there may be along the line of the road. In *Clark v. Railroad Co.*, 28 Minn. 128, 9 N. W. Rep. 581, a brakeman was killed by striking an awning which projected over a side track in such a position that its lowest projection would strike a man of ordinary height on the head, while it would not come in contact with a man standing eight inches or a foot aside from the centre of the car. The brakeman was struck by the corner of the awning while engaged in the performance of his duty in moving freight-cars upon the side track. The court *held* that the railroad company failed in its duty to the brakeman, and that, if the brakeman had no knowledge of the peril, the company would be responsible for the injury. See also *Greenleaf v. Railroad Co.*, 33 Iowa, 52; *Allen v. Railroad Co.*, 57 Iowa, 623; *Dorsey v. Construction Co.*, 42 Wis. 583; *Walsh v. Railway & Nav. Co.*, 10 Or. 250; *Railway Co. v. Oram*, 49 Tex. 342.

"The doctrine of these authorities more clearly accords with our views than do some of those cited by the plaintiff in error. Most of the latter, however, were disposed of on the theory that the employee had actual knowledge of the peril which he encountered. In this case, the jury have said, and not without testimony, that Irwin had no knowledge, nor opportunity to know, of the dangerous character of the bridge. It is true that he had run over the road and through the bridge daily for three months preceding the accident. He knew of the existence of the bridge, and that it was constructed with overhead timbers; but it does not necessarily follow that he was acquainted with the proximity of the braces to the top of the caboose or cars. When he entered the service of the company, he assumed the ordinary risks incident to the service; and if he enters or continues in the service with a knowledge of the risk or danger, and without objection, he must abide the consequences. *Jackson v. Railway Co.*, 31 Kan. 761; *Railway v. Peavey*, 34 Kan. 472; *Rush v. Railway Co.*, 36 Kan. 129. The law, however, does not require that an employee shall know of all defects or obstructions that may exist on the road, or in the service in which he is engaged; and it cannot be said that the peril

in this case was so obvious and patent that Irwin must have known it. He had a right to assume that the company had done its duty, and placed its track in such a condition that he could perform his duties with reasonable safety. The fact that a portion of the bridge was sufficiently high to clear a man's head while standing on top of a car, and other parts were not, made the bridge all the more deceptive and dangerous. Irwin, being a conductor, was not called to the top of the train so frequently as brakemen were, and hence would be less likely to notice the lowness of the timbers in the bridge. He testified that he supposed the bridge was sufficiently high so that it would be safe to stand on any part of the car. Several brakemen and others who passed through the bridge stated that they could not say from looking at the bridge that the braces were so low as to strike or injure one who was on top of a train. Men of experience say that it is a very difficult matter to tell exactly how high an object is above a moving train. The smoke of the engine, and the side or swaying motion of the cars, render it hard to see and comprehend the proximity of the overhead timbers of a bridge, and this is very well shown by the widely differing statements of the witnesses respecting the height of the braces in question. It does not appear that Irwin had been on top of the cars while passing through the bridge more than once before the time of the accident, and he says that he knows of no other bridge on the road with braces so low as they are in this one. The plaintiff had unloaded freight from his station at El Dorado, and, in accordance with the directions of the train-master, had backed down half a mile in order to make a run over a high grade, and over the crossing of the Atchison, Topeka, & Santa Fe Railroad, which was a few yards beyond the station. A train on that road was approaching the crossing, and Irwin sent one of his brakemen to flag the crossing, while he ran back over the cars of his train to the caboose. He remained on top of the caboose to watch the Santa Fe train, in order to give the necessary signal, and avoid a collision. It seems that on the previous day his train had almost collided with the Santa Fe train at the same crossing. It is said that Irwin might have required a brakeman to perform the duty on top of the caboose instead of going there himself; but it appears that his action in that respect was not outside the scope of his duties. Under all the testimony, we cannot say that the danger was so open and obvious that Irwin knew or should have known of it, nor can we say that he was guilty of contributory negligence. Whether he acted with ordinary care, is a mixed question of law and fact which was proper for the determination of the jury, taking into consideration all the facts and circumstances. The jury has passed upon the question on competent testimony, and we are unable to say that its finding is unwarranted. *Huddleston v. Lowell*, 106 Mass. 282; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Dale v. Railway Co.*, 63 Id. 455; *Wood, Mas. & S. sects.* 376, 385, and cases heretofore cited."

Injury to Brakeman caused by his being thrown from Car by coming in Contact with Bridge Truss is Risk assumed. — A brakeman on a freight-train was standing on a flat car while the train was approaching a bridge; the engineer signalled for brakes; and in response thereto the brakeman immediately sprang and caught the round of a ladder on the side of a box car, and, swinging himself around to ascend, his body came so far out as to come in contact with the trusses of the bridge with such force that he was thrown from the ladder, run over by the train, and killed. *Held*, that his death "was one of the risks incident to his employment," and there could be no recovery. *Illick v. Flint & P. M. R. Co.* (Mich.), 35 N. West. Rep. 708.

Brakeman standing on Extra High Car knocked off by Bridge. — Case for Jury. — In an action against a railway company for wrongful death, evidence tended to show that defendant put into its train one car of a different kind and higher than those generally used; that while standing on said car, whither deceased had gone in discharge of his duty as brakeman, the train passed

under a bridge, and deceased was thrown off and killed ; that several persons were looking towards him at the time, but gave him no warning, seeming to apprehend no danger. *Held*, proper evidence for the jury, on the questions of defendant's negligence and decedent's contributory negligence, and that nonsuit was erroneous. *Stirk v. Central R. & B. Co. (Ga.)*, 5 S. East. Rep. 105.

What is a Defective Bridge. — In *Illick v. Flint & P. M. R. Co. (Mich.)*, 35 N. West. Rep. 708, an action for damages for the negligent killing of a brakeman by reason of a defective and improperly constructed bridge, it was shown that the bridge was thirteen feet and four inches wide between the trusses, which were ten feet high ; that it had been in use a number of years ; that it was sound and safe for the passage of trains, and without defect and in good repair at the time of the accident. *Held*, there was no negligence on the part of the company.

The court said, " Whether it was fourteen or twenty-four feet wide was a matter of no concern of the brakeman, so long as he was not required to occupy a place of danger in the discharge of his duties while passing over it, and this he was not required to do. A railroad company cannot be required to condemn and remove a bridge, which is without fault in its plan or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some engineer shall pronounce it not as good or convenient as some other kind. Railroad companies must be allowed to use their own discretion as to the kind of bridges they will use, and when and under what circumstances they will remove or replace them, while they are safe. Any other rule would be both unjust and oppressive. As between the employers and employed, it is unquestionably the duty of a railroad company to provide a track and equipments which shall be reasonably safe ; but this does not oblige the company to make use of the latest improvements, or to change the structures upon its road so as to conform to the most recent or advanced improvements and ideas upon such subjects ; neither does good railroading require any such thing. *Cooley, Torts*, 151, 152 ; *Wonder v. Railroad Co.*, 32 Md. 411 ; *Coombs v. Cord Co.*, 102 Mass. 572 ; *Railroad Co. v. Gildersleeve*, 33 Mich. 133 ; *McGinnis v. Bridge Co.*, 49 Mich. 466 ; *Batterson v. Railroad Co.*, 49 Mich. 184 ; s. c., 8 Am. & Eng. R. R. Cas. 123 ; *Railroad Co. v. Huntly*, 38 Mich. 537 ; *Smith v. Potter*, 46 Mich. 258, 264 ; s. c., 2 Am. & Eng. R. R. Cas. 140 ; *Hathaway v. Railroad Co.*, 51 Mich. 253, 262 ; s. c., 12 Am. & Eng. R. R. Cas. 249 ; *Hewitt v. Railroad Co.*, 31 Am. & Eng. R. R. Cas. 249 (decided at the last term of this court). While it is the duty of the company to furnish sufficient and safe material, machinery, and other means by which the work of the employed is to be performed, and keep the same in order and repair, and his contract implies that, in regard to these matters, the employer will make adequate provision against negligence on the part of the company, and that no danger shall ensue to him therefrom, it is well settled that the employed assumes all the risks and perils usually incident to the employment, and that included in such risks and perils are those which it is a part of the duty of the employed to take knowledge of by observation. 2 *Thomp. Neg.* 983 ; *Cooley, Torts*, 551 ; *Railroad Co. v. Austin*, 40 Mich. 247 ; *Swoboda v. Ward*, Id. 422 ; *Henry v. Railway*, 49 Mich. 498 ; s. c., 8 Am. & Eng. R. R. Cas. 110 ; *Batterson v. Railway Co.*, 53 Mich. 128 ; *Brewer v. Railroad Co.*, 56 Mich. 620 ; *Hewitt v. Railroad Co.*, *supra* ; *Davis v. Railroad Co.*, 20 Mich. 126 ; *Gardner v. Railroad Co.*, 26 N. W. Rep. 301 ; *Gibson v. Railway Co.*, 63 N. Y. 450 ; *Owen v. Railroad Co.*, 1 Lans. 108 ; *Ladd v. Railroad Co.*, 119 Mass. 412 ; *Lovejoy v. Railroad*, 125 Mass. 79.

OLSON

v.

ST. PAUL, MINNEAPOLIS, & MANITOBA R. CO.

(*Minnesota Supreme Court, Jan. 10, 1888.*)

Master and Servant. — Foreman and Section-Men are Fellow-Servants. — The foreman of a gang or section of track-men engaged in the discharge of his ordinary duties in the course of his employment is a fellow-servant with them.

Same. — Risks of Employment. — Running Special Trains without Notice. — Where it is the established practice and one of the rules of a railway company to run special or irregular trains at any time without notice in advance to station agents or section-men, who are required to govern themselves accordingly, and it appears from the evidence that an engine with snow-plough is a train of that class, *held*, that sending out such a train over the road in a storm, without such notice, was not negligence, but that the risks to track-men attending its use are among those assumed by those employees, if they are informed of the rule, or if, from their observation and knowledge of the practice of the company in respect to running such trains, they knew, or ought to have known in the exercise of ordinary intelligence and reasonable prudence, that such a train might be expected.

Same. — Knowledge of Danger. — Upon the evidence in this case, *held*, error for the court to refuse to charge the jury that, if the injured employee knew of such usage and practice of the company, he could not recover.

APPEAL from District Court, Grant County; Baxter, Judge.

J. W. Reynolds for Olson, respondent.

W. E. Smith and *R. B. Galusha* for St. Paul, M. & M. R. Co., appellant.

VANDEBURGH, J. — The plaintiff's intestate was one of a gang of section-men employed by defendant on the line of its road, under the direction of a foreman who had charge of the men on the particular section where he was killed by a snow-plough while engaged with others with a hand-car on the track. They appear to have been engaged in their ordinary work under the direction of the foreman, who was present with them, and who was also killed by the same accident. They had been shovelling snow, and were at the time returning to the section-house with the car, in the midst of a severe storm of snow and wind, in consequence of which they did not hear or see the approach of the engine and snow-plough in time to make their escape.

1. The foreman was a fellow-servant with the deceased, and

in the discharge of his duties did not represent the master as such, and for his acts or omissions in the discharge of such duties in the course of his employment the defendant was not liable. *Cook v. Railway*, 34 Minn. 47; *Brown v. Railway*, 31 Minn. 553; s. c., 15 Am. & Eng. R. R. Cas. 333; *Brown v. Railroad*, 27 Minn. 162; *Fraker v. Railway*, 32 Minn. 57; s. c., 15 Am. & Eng. R. R. Cas. 256; *Capper v. Railway*, 103 Ind. 308; s. c., 21 Am. & Eng. R. R. Cas. 525, and cases cited. We are not now speaking of the duty of the master to make known in some suitable way to the servant the existence of risks not known to him, and which he has not impliedly assumed in his contract of employment. *Engine Works v. Randall*, 50 Am. Rep. 801, 100 Ind. 293.

Foreman and
section-men
fellow-ser-
vants.

2. The admissions in the reply eliminate from the case all questions of negligence on the part of the company in respect to the running and operation of the engine and snow-plough, and affirm that the usual and proper signals were given on approaching the station, and that "the said engine and snow-plough were run and operated in a careful and prudent manner, and at a proper rate of speed, by defendant's servants then in charge thereof, and that they were personally guilty of no negligence in the premises," so that the only remaining questions are, whether the defendant owed the duty to the section-men to give them special warning of the fact that the snow-plough was sent out over that division of the road, or had failed in its duty to inform the men of its rules permitting wild or extra trains to be run without special notice or warning to the men of their approach, and requiring them to govern themselves accordingly.

No question as
to negligence
of company in
running train.

3. The rules of the company referred to, and which were put in evidence, are as follows: "Rule 66. No notice will be given to station agents of the passage of irregular trains, and they will govern themselves accordingly." "Rule 70. Track and bridge men must use the utmost caution at all times, as under the telegraphic system of running trains a train may be expected at any moment. No notice whatever will in any case be given of the passage of extra trains. Foremen will govern themselves accordingly."

Running
special train
without notice.
Risk of em-
ployment.

The evidence in the case shows that regular trains run according to schedule time, and that wild, special, or extra trains run at any time, and that an engine and snow-plough is a train of this class, of whose approach no notice is given under the rules and practice of the company. Now, if the deceased and his fellow section-men knew, or from their observation and information about

the running of the trains ought, in the exercise of ordinary intelligence and prudence, to have known, that an extra or wild train might come over the road at any moment without notice, they must be deemed to have assumed this as one of the hazards incident to the employment (*Railway Co. v. Leech*, 41 Ohio St. 391; *McGrath v. Railroad Co.*, 18 Am. & Eng. R. R. Cas. 6; *Railroad Co. v. Wachter*, 60 Md. 395; s. c., 15 Am. & Eng. R. R. Cas. 187); and we are unable to see why there should be any exception in the case of a snow-plough, or that the act of sending out the snow-plough over the line in this particular instance was in itself negligent or wrongful under the rules referred to. There does not seem to be any reason why at that season, and in such a storm, a snow-plough might not with as much reason be expected as any other extra train. The employees of the company are presumed to understand the nature, use, and operation of snow-ploughs, and that they are liable to be run frequently over the road in the proper season, as well during storms as at other times; and if any extra risk attends their use, it must be met by corresponding care and caution on the part of the men. *Railroad Co. v. Hester*, 21 Am. & Eng. R. R. Cas. 537; *Hughes v. Railroad Co.*, 27 Minn. 140.

4. This brings us to the consideration of the evidence on the question of the notice or knowledge which the deceased had in respect to the established rules and usage of the company in running extra trains without notice. The complaint alleges generally that the "defendant negligently, wrongfully, and suddenly, without previous warning, notice, or announcement, ran its snow-plough over its line from an easterly direction" upon and over the deceased. This the answer denies, and sets up and relies upon the existence of the rules above quoted. It is undoubtedly the rule that the burden rests on the plaintiff, asserting a breach of duty by the defendant, to prove it. *Fraker v. Railway Co.*, 32 Minn. 59. But where, as in this case, the defendant admits that the train was run without any precaution or notice in advance that a wild train was to be expected, and, to rebut any presumption of negligence in the premises, relies upon its rule dispensing with such notice, it is incumbent on the defendant, in order to give effect to it, to show that its employees were duly informed of the rule, or have such knowledge of the usage and practice of the company in the premises as would be equivalent thereto, and fully acquaint them with the dangers arising from this particular cause. There may, perhaps, be some question whether this issue was fairly tendered by the complaint; but the defendant appears to have so treated it, and the case seems to have been tried on that theory. As the foreman was

Knowledge of
employee of
practice of
running special
trains without
notice.

also killed in the collision, evidence had to be obtained from other sources. How long the deceased had been engaged in this service does not appear, but the evidence shows that he must have been engaged so for a week at least before the accident ; but it fails to show that the rules were ever shown or furnished to him, and there is some evidence tending to show they were not. By the terms of rule 70 (and the same fact appeared by other evidence) it was undoubtedly the duty of the foreman to inform the men under him that trains might be expected without notice, and to warn them of the danger ; and as this was the duty of the master, he must *pro hac vice* be held to represent the master, and his neglect or omission of this duty would be that of the master. *Slater v. Jewett*, 85 N. Y. 71. But if the section-men acquired knowledge of the facts and risks from other sources, and had learned that the rule and practice of the company were to send out extra trains without notice, and that section-men were obliged to be always on the lookout therefor, then, by continuing in the service, they would be considered as voluntarily assuming the risks from this cause, as well as others connected with the employment. *Haskin v. Railroad Co.*, 65 Barb. 134. The evidence tended to show that a quarter or more of the trains sent out are specials or extra, — despatched without notice, — and that such is the uniform practice of the defendant, and that during the month of February, 1884, to the date of the accident, such trains over that section of the road averaged one or more each day ; and also that the exigencies of the business and the impracticability of notifying section-men in advance, owing to the nature of their work, extending over miles of track, and often remote from telegraph stations, obviously rendered it necessary to dispense with notice, and to adopt the present uniform practice in conformity with rule 70. And this fact itself, and the nature of the employment, would naturally suggest the importance of extra caution on the part of the men, and a reason for the rule. We think, therefore, there was evidence for the consideration of the jury tending to prove that the deceased had notice of the usage of the company, and that it was error for the court to refuse the defendant's first request to charge the jury to the effect that, if they should find that the deceased knew of such usage and practice of the company, he could not recover. There must therefore be a new trial.

Order reversed, and new trial granted.

Foreman and Subordinates as Fellow-Servants. — See *Criswell v. Pittsburg, etc., R. Co.*, and note, *ante*, p. 232.

Risks assumed by Servants. — See *Indianapolis, etc., R. Co. v. Watson*, and note, *ante*, p. 334.

Employee Injured while violating Rule. — See *Gulf, etc., R. Co. v. Ryan*, and note, *ante*, p. 289.

MISSOURI PACIFIC R. Co.

v.

MACKEY.

(127 U. S. 205.)

Law ahrogating Fellow-Servant Rule is Constitutional. — The statute of Kansas of 1874, c. 93, sect. 1, p. 143, Comp. Laws Kansas, 1881, p. 784, which provides that "every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage," does not deprive a railroad company of its property without due process of law, and does not deny to it the equal protection of the laws, and is not in conflict with the Fourteenth Amendment to the Constitution of the United States in either of these respects.

ERROR to the Supreme Court of the State of Kansas.

The case, as stated by the court, was as follows :—

In 1882 the defendant below, the Missouri Pacific Railway Company, a corporation created under the laws of Kansas, operated lines of railway in the latter State. It also had control of two track-yards adjacent to the city of Atchison, designated respectively as the upper and lower yard, and it used two switch-engines in moving cars from one yard to the other. On the 11th of February of that year the plaintiff was in the service of the company as a fireman on one of these engines employed in transferring cars from one point to another in the upper yard, when it was run into by the other engine, owing to the negligence of the engineer of the latter. By the collision the right foot and leg of the plaintiff were so crushed as to necessitate amputation. For the damages thus sustained the present action was brought in a District Court of the State. On the trial the defendant requested the court to instruct the jury, that, if they found from the evidence that the plaintiff was injured through the carelessness of a fellow-servant, he could not recover; which instruction was refused, and the defendant excepted. The court charged the jury as follows :—

"At the common law a master or employee could not be held liable for an injury sustained by one servant by reason of the mere negligence of a fellow-servant engaged in the same common employment, the negligence of the fellow-servant not being deemed in such case the negligence of the master, and such was

the law of this State up to 1874; but at that time this rule of the common law was abrogated, so far as it related to railroad companies and their employees in this State, by a statute which reads as follows:—

“‘Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage.’

“This enactment so far modifies and changes the common law, that a servant or employee of a railroad company may maintain an action against such railroad company for an injury received while in the line of his employment through the negligence of a fellow-servant or employee engaged with him in the same common work of the master or employer, unless such injured servant or employee has himself been guilty of negligence or want of ordinary care which has directly contributed to produce the injury complained of.”

To this charge the defendant excepted. The jury found a verdict for the plaintiff for \$12,000, upon which judgment was entered. On appeal to the Supreme Court of the State the judgment was affirmed; and to review the latter judgment the case is brought here.

John F. Dillon, with whom was *Winslow S. Pierce, jun.*, on the brief, for plaintiff in error.

Thomas P. Fenlon for defendant in error. *John C. Tomlinson* with him on the brief.

FIELD, J. — At the trial, and in the Supreme Court of the State, it was contended by the defendant, and the contention is renewed here, that the law of Kansas of 1874 is in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it deprives the company of its property without due process of law, and denies to it the equal protection of the laws. Case stated.

In support of the first position the company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employees caused by the negligence or incompetency of a fellow-servant, which prevailed in Kansas and in several other States previous to the Act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after knowledge of his negligence or incompetency. The rule of law is conceded where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow-servants in the same The contention of the company.

common employment, and acting under the same immediate direction. *Chicago & Milwaukee Railway v. Ross*, 112 U. S. 377, 389; s. c., 7 Am. & Eng. R. R. Cas. 501. Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company, as we understand it, is, that that law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes in such cases the taking of property without due process of law, in violation of the Fourteenth Amendment. The plain answer to this contention is, that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute-books of every State. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with clauses of the Fourteenth Amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine, and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow-servant in the same general employment, and acting under the same immediate direction. That its passage was within the competency of the Legislature, we have no doubt.

The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws, is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be farther from

State may pre-
scribe liabili-
ties of corpora-
tion.

The law not in
conflict with
the 14th
Amendment.

the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment. *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U. S. 394; s. c., 24 Am. & Eng. R. R. Cas. 523; *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U. S. 187. But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufactories. See *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512, 523; s. c., 22 Am. & Eng. R. R. Cas. 557; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703.

Judgment affirmed.

Statutes making Railroad Companies Liable for Injuries to one Servant owing to Negligence of Fellow-Servant. — See *Gumz v. Chicago, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 383; *Union Trust Co. v. Tomason*, 5 Ib. 589; *Missouri Pac. R. Co. v. Haley*, 5 Ib. 594; *Cox v. Great Western R. Co.*, 6 Ib. 584; *Sloan v. Central Iowa R. Co.*, 11 Ib. 145; *Malone v. Burlington, etc., R. Co.*, 11 Ib. 166; *Gibbs v. Great Western R. Co.*, 11 Ib. 235; *Atchison, etc., R. Co. v. Farrow*, 11 Ib. 239; *Herrick v. Minneapolis, etc., R. Co.*, 11 Ib. 256; *Kansas Pac. R. Co. v. Peavey*, 11 Ib. 260; *McLeod v. Ginther*, 15 Ib. 291; *Atchison, etc., R. Co. v. King*, 15 Ib. 330; *McKune v. California Southern R. Co.*, 17 Ib. 589; *Malone v. Burlington, etc., R. Co.*, 17 Ib. 644; *Missouri Pac. R. Co. v. Mackey*, and note, 22 Ib. 306-333.

SAWYER

v.

MINNEAPOLIS & ST. LOUIS R. CO.

(*Minnesota Supreme Court, Jan. 2, 1888.*)

Liability of Company owning Defective Car for Injury to Servant of another Company. — The plaintiff was injured in consequence of a defective step-ladder on one of defendant's freight-cars. He was not at the time in the service of the defendant, but of another company, which was then using the car in its own business. The car had been sent over the road of the latter company, which connects with that of the defendant, consigned to a point in another State; but, on its return, it was transferred beyond the point of junction at which it should have been returned to defendant, and was loaded with freight consigned to a distant point on such connecting road. *Held*, that the defendant owed no duty to the plaintiff in respect to the condition of the car growing out of contract or otherwise, and that this action cannot be maintained.

APPEAL from District Court, Waseca County; Buckham, Judge.
Lusk & Bunn for Sawyer, appellant.

B. S. Lewis for Minneapolis & St. L. Ry. Co., respondent.

VANDEBURGH, J. — One of defendant's cars was loaded with plaster at Fort Dodge, Iowa, and transported over its line to Waseca, in this State, a point of junction with the
 1 acts. Winona & St. Peter Railroad. It was consigned to Alma Centre, in Wisconsin, a station on the Green Bay Railroad, and was thereupon transferred and taken over the two last-named roads to its place of destination. On its return trip, it was reloaded with freight (emigrant movables), and consigned to Huron, Dakota, over the Winona & St. Peter and Chicago & Northwestern roads. The car was sent out from Waseca March 15, 1886, and passed through the same place on its return, April 15. Huron is 260 miles west of Waseca. The car arrived at Tracy, a point on the Winona & St. Peter road, 135 miles

west of Waseca, on the evening of the last-named day. Winona, Waseca, and Tracy are division stations, where trains are made up, and cars inspected, and repairs made. A new train was made up at Tracy for Huron, including the car in question; and the same evening the plaintiff, a brakeman in the employ of the Chicago & North-western Railroad Company, was injured while attempting to ascend the ladder of the car. As he took hold of the second round, it pulled off, and he was thrown between the cars, and seriously hurt. The car was repaired and returned empty, billed from "Huron to Winona," but stopped at Waseca on April 13, and was then returned to the defendant. The evidence tends to prove that the round which broke loose had not been securely or properly attached to the body of the car, and that apparently, when repaired, it had been fastened with a screw which was fixed in or beside a piece of wood which, in process of time, ceased to hold it firmly, and the ladder had become unsafe.

At the time of the accident it is clear that the car was not in the service of the defendant. There is no evidence that its use beyond and west of Waseca was authorized by defendant. And though railway companies, for convenience or by reason of the urgency of their business, not unfrequently make such use of foreign cars, or cars from connecting lines belonging to other companies, when they get possession of them, yet the evidence fails to show any general custom from which an authority can be implied to retain or divert such cars to a special or general use in their own business, further than is necessary or proper on their return to the place or point of junction whence they may have been taken. The evidence shows, that while, from the nature of the case, it is difficult to prevent such use of cars, yet that the owners object to it, and that it is considered "an abuse of a car" to retain it and use it in the business of the bailee on its own lines further than is reasonably necessary in returning it. If the defendant had seasonably regained control of the car, it may be presumed that it would have inspected and repaired the same in due course. It is evident that its liability could not continue indefinitely for defects which might be developed from the faulty construction of cars kept out of its use.

At the time of the accident the car was under the management and control of the company operating it, and not of the defendant. It did not come to the hands of the plaintiff through the agency or by the authority of the defendant, and there is no privity between them. It owed him no duty growing out of contract, and was not bound to furnish him safe instrumentalities. As to the

Defendant
owed plaintiff
no duty, and is
not liable.

defendant, the plaintiff was a mere stranger. *Winterbottom v. Wright*, 10 Mees. & W. 108; *Loop v. Litchfield*, 42 N. Y. 358; *Thomp. Neg.* 227, 237.

There is a class of actions in tort which are maintained on the ground that the wrongful acts or omissions on the part of the defendant are such as are in themselves imminently dangerous to others, and from which a general liability arises to any one for injuries which can be traced as the natural and probable consequences of such acts. *Thomas v. Winchester*, 6 N. Y. 402, and cases cited; *Smith v. Railroad Co.*, 19 N. Y. 130. But this case evidently does not belong to that class, and the defendant owed no such general duty to the plaintiff or others not in privity with it. *Kahl v. Love*, 37 N. J. Law, 8; *Longmeid v. Holliday*, 6 Exch. 761; *Collis v. Selden*, L. R. 3 C. P. 495. The liability of the defendant in respect to the condition of its cars did not extend beyond those to whom it owed some duty by reason of its relation to them as master, employer, or carrier. Any other rule would be found impracticable of application in ordinary business operations. *Thomas v. Winchester*, *supra*, 408; *Kahl v. Love*, *supra*.

A new trial was properly granted. Order affirmed.

Injury to Servant of one Company using Tracks of another Road.—In an action for damages sustained by an employee of the Port Royal Railroad while its train was by license running on the track, alleged to have been defective, of the Augusta Railroad, *held*, that the latter company was liable if it failed to furnish a track over which the train might safely run. In such case, if the injury was caused by a defect in the trucks of the cars of the company of which plaintiff's husband was an employee, she cannot recover from the other company; but if caused both by defect of the trucks of the cars of the Port Royal and in the track of the Augusta company, then plaintiff would be entitled to recover in the proportion the defective track contributed to the injury. *Augusta & K. R. Co. v. Killain* (Ga.), 4 S. East. Rep. 165.

Engineer Injured at Crossing of Two Roads owing to Defective Track of other Company.—Defendant W. R. Ry. Co. owned and controlled two parallel switch lines in the city of Indianapolis, which were crossed by the line of defendant I., B. & W. Ry. Co. These switch lines were designed and permitted to be used for the purpose of transporting freight and cars to and from a pork-house by the various connecting lines coming into the city. Plaintiff, an engineer on a connecting line, while approaching the crossing of the I., B. & W. track on one of the switch lines, was injured through his engine being run into by a car of another connecting line, which car left the track by reason of the loose and unsafe condition of the crossing at the I., B. & W. track with the other switch line. Plaintiff was proceeding across the track of the I., B. & W. Co. upon a signal given by said company. *Held*, that plaintiff was at the place where he was injured upon the invitation of both defendants, and that both were under obligation to provide for his safety while passing over their tracks.

Plaintiff knew of the unsafe condition of a railway crossing at which the car that caused his injury left the track, but no defect was shown to exist in the track he was using, or in the crossing over which he was trying to pass, when he was hurt. *Held*, that he was not guilty of contributory negligence. *Indiana, Bloomington, & W. R. Co. v. Barnhart* (Ind.), 16 N. East. Rep. 121.

ST. LOUIS, FORT SCOTT, & WICHITA R. CO.

v.

WILLIS.

(*Kansas Supreme Court, Jan. 7, 1888.*)

Injury to Servant. — Negligence of Independent Contractor. — Where a railroad company contracts with a construction company to survey and locate its line, procure its right of way, build its road-bed, tracks, bridges, side-tracks, etc., and equip the same with engines and cars, in accordance with certain specifications, such provisions of the construction contract make the construction company an independent contractor, in the sense that the railroad company is not liable for injuries occasioned by a defective track, or the negligence of employees on a train laden with construction materials, on a part of the line constructed by the contracting company, and remaining under its control, and not inspected and accepted, or operated by the railroad company. It is error to render a judgment against the railroad company for such injury.

Trial. — Special Findings. — Misconduct of Jury. — When a jury returns evasive and unsatisfactory answers to certain special questions submitted to them, and to others makes answers that are not supported by any evidence, and persists in such a course after objection is made to such answers by counsel, and after admonition by the court, it is a good and sufficient cause for a reversal of the case, and the granting of a new trial. *Railway Co. v. Fray*, 15 Am. & Eng. R. R. Cas. 158, cited and followed.

COMMISSIONERS' decision. Error to District Court, Sedgwick County; T. B. Wall, Judge.

This action was instituted by Maggie Willis, administratrix of the estate of Charles R. Willis, deceased, against the St. Louis, Fort Scott, & Wichita Railroad Company, and the Ellsworth, McPherson, Newton, & South-eastern Railway Company, to recover damages for the death of the intestate, Charles R. Willis, her husband, caused, as she alleges, by the negligence of the defendant railroad companies.

The material parts of her petition are as follows: "(4) That said Charles R. Willis, deceased, was on the twenty-eighth day of June, A.D. 1885, in the employment of both defendants, at their request, as brakeman and laborer for said defendants; and that on said day, while discharging his duties, at defendants' said request, as such brakeman and laborer, he was riding on one of the cars belonging to the defendant, going over the Ellsworth, McPherson, Newton, & South-eastern Railroad from Newton, Harvey County, Kansas, to El Dorado, Butler County, Kansas, said car being attached to a locomotive and other cars, all belonging to defendants, and under the control and under the management of their

servants, agents, and employees. (5) That the car on which said Willis was riding was old and worn and defective, and the other cars, and the locomotive attached thereto, were also unsound and defective, and unfit for use as rolling-stock upon the road, and the track itself was uncompleted, and in bad condition, and it was unsafe and dangerous to pass cars thereover; all of which defendants and their agents knew, but of which this said Willis was ignorant. (6) Nevertheless, the defendants negligently and wrongfully and knowingly suffered and caused all of said cars, and the said locomotive, and the said track to be used in passing said cars and locomotive to and fro over said track; and while Charles R. Willis, deceased, was riding on the car above mentioned, in Harvey County, passing from Newton to El Dorado, as aforesaid, engaged in the discharge of his duties as brakeman, as aforesaid, at the request of said defendant, and while he was exercising due care and caution, the said car, and the other cars, and locomotive thereto attached, and propelling the same, were by reason of the defective and unsound and unsafe condition of all said cars and locomotive and track, and the negligence of defendants and their employees — other than said Willis — in handling, controlling, and operating said cars and locomotive over said track in an unskilful and careless manner, thrown from the track with great violence, and a sudden shock, whereby, and by reason whereof, the said Willis, without any fault or negligence of his own, was unavoidably and forcibly thrown to the ground from the said car on which he was riding; and falling on the track or near there, in front of the wheels of the cars, the said wheels ran upon and across him, crushing and lacerating his limbs, and fatally wounding him, so that, after lingering in agony and pain for about one hour, he died from the effects thereof."

Each of the defendant railroad companies filed separate answers, pleading general denials, and alleging that the injury was the result of, and was directly caused by, the negligence and carelessness of the said Charles R. Willis. There was a trial at the February term, 1886, of the Sedgwick District Court, and a verdict and judgment for the plaintiff for \$5,000. Special questions were submitted to the jury, at the request of the plaintiffs in error, and answered as follows: "(1) Was there at this time, and prior to this accident, a corporation known as the 'Ellsworth, McPherson, Newton, & South-eastern Railroad Company'? *Answer.* Yes. (2) Was there a corporation known at this time as the 'West Kansas Construction Company'? *A.* According to the evidence, yes. (3) Was there any contract between the said Ellsworth, McPherson, Newton, & South-eastern Railway Company and the West Kansas Construction Company for the construction of the road from the city of El Dorado to the city of Newton, and was that

contract in writing, and was said road built under said contract? *A.* No. The contract was made with Mr. —, of New York.

(4) Is it not a fact that the St. Louis, Fort Scott, & Wichita Railroad was not a party to said contract? *A.* Yes. (5) Is it not a fact that the St. Louis, Fort Scott, & Wichita Railroad did not construct said railroad? *A.* In some respects they did. (6) Is it not a fact that D. P. Jones was president of the West Kansas Construction Railroad Company? *A.* Charter so states. (7) Is it not a fact that John Gaffney was the boss track-layer for the West Kansas Construction Company in the construction of said road from the city of El Dorado to the city of Newton? *A.* Yes. (8) Is it not a fact that N. S. Woods was the engineer of said road from El Dorado to Newton for said West Kansas Construction Company? *A.* Yes. (9) Is it not a fact that the said D. P. Jones had charge of the construction of said road, under said contract, in behalf of the West Kansas Construction Company? *A.* No. (10) Is it not a fact that the said N. S. Woods was subject to his orders and control? *A.* We do not know. (11) Is it not a fact that the said John Gaffney was subject to the immediate orders and control of said N. S. Woods and the said D. P. Jones? *A.* We believe that he was subject to the orders of N. S. Woods. (12) Is it not a fact that John Gaffney had the immediate charge of the construction and control of the persons who had charge of the supply-train, including the car and engine connected therewith? *A.* We believe, from the evidence, he had, so far as to informing them what supplies he wanted. (13) Is it not a fact that the St. Louis, Fort Scott, & Wichita Railroad did not direct or control the construction of said road, or the men employed in and about the construction thereof? *A.* We do not so understand it. (14) Is it not a fact that the deceased, C. R. Willis, had been discharged or suspended from the employment of the St. Louis, Fort Scott, & Wichita Railroad for some time before he went to work on the construction of the Ellsworth, McPherson, Newton, & South-eastern Railway? *A.* Not discharged. (15) Is it not true that he worked on the construction of said road after the time he went there until the time of his death? *A.* Evidence shows that he was at work on the train that hauled supplies for said road. (16) Is it not true that the engine and car with which the said Willis was connected at the time of his death had been before that for a time leased or rented or hired to the West Kansas Construction Company, for which it was to pay the said railroad company a consideration therefor? *A.* There was no evidence showing that there was any compensation paid for the use of said engine and said car. (17) Is it not a fact that the time and the accounts of the said messenger, and the said Willis, deceased, and the other brakemen, were kept sepa-

rately, and marked on the rolls of the West Kansas Construction Company? *A.* The accounts and time were kept on the rolls of the St. Louis, Fort Scott, & Wichita Railroad Company, but can't say that they were kept separately. (18) If you find the said Willis, deceased, has not been paid, is it not a fact that the West Kansas Construction Company owes him for his services? *A.* We do not find it so. (19) Is it not a fact that the Ellsworth, McPherson, Newton, & South-eastern Railway did not employ anybody, or pay anybody, in the construction of the road, excepting the West Kansas Construction Company? *A.* Do not know. (20) Is it not a fact that the Ellsworth, McPherson, Newton, & South-eastern Railway Company did not exercise any control or direction whatever over the engine or cars or men employed in the construction of its railway, or in the mode and manner of the construction thereof? *A.* We do not know. (21) Is it not a fact that the only action by the Ellsworth, McPherson, Newton, & South-eastern Railway was by and through the president, J. W. Miller, in the accepting of the road, for the purpose of determining if it was being built in accordance with the contract? *A.* We do not know. (22) Is it not a fact that the Ellsworth, McPherson, Newton, & South-eastern Railway Company did not accept the said road, or any part thereof, until after the first day of July, 1885, and until after the same was built and completed from the city of El Dorado to the city of Newton? *A.* Evidence does not show when officially accepted. (23) Who were the principal persons in charge of the construction, and in the control and the operation, of the Ellsworth, McPherson, Newton, & South-eastern Railway from the beginning of its construction to the time of its completion and acceptance, July 1, 1885? *A.* J. W. Miller, N. S. Woods, and John Gaffney, according to the evidence. (24) When, if at all, did the Ellsworth, McPherson, Newton, & South-eastern Railway Company, with reference to the time of the accident in question, become consolidated with the St. Louis, Fort Scott, & Wichita Railway; was it before, or after? *A.* No date given in evidence. (25) What do you find was the cause of the car jumping the track at the time Willis was killed? *A.* Train running at too great a speed for the condition of the road and the make-up of the train. (26) What position was Willis occupying at the time he was thrown from the box? *A.* At the end of the car, near the brake. (27) Is it not a fact that the deceased, Willis, knew the condition of the track over which the train was passing at the time he was killed? *A.* We have no means of knowing as to Willis's personal knowledge as to the actual condition of the track at that point. (28) Is it not a fact that he had been running back and forth over the track for a week or ten days, and had a reasonable opportunity for knowing

the condition of the track? *A.* No, as the last train over might have misplaced the track. (29) Is it not true that it was his duty, as well as that of the other brakemen, in the position in which he was located, and the direction in which the train was running, to signal the engineer if he was going too fast, and also to apply the brakes when the engineer had ceased to use steam, if the train was going too fast down grade? *A.* Yes, it is true, and we understood from the evidence that he did so signal and apply the brakes. (30) Is it not true that he had a reasonable opportunity to know how the car upon which he was riding, and upon which he had been riding for a week or ten days, was constructed? *A.* Although his position as brakeman gave him a reasonable opportunity to notice the construction of the car, yet his supposed want of knowledge in that branch of the service would naturally prevent his discovering its defects. (31) If you believe that the condition of the track caused the car to leave the track, state wherein the track was defective. *A.* We do so believe, and herewith state that, from the evidence adduced, we find that the rails were laid on ties that were about four feet apart, and the spikes were driven in only every alternate tie, making about eight feet between spiked ties, and not sufficient surfacing was done to hold the ties in place; consequently, in connection with the high rate of speed, making-up of the train, the condition of the track, these united causes made the car leave the track."

J. H. Richards, and Harris, Harris, & Vermillion for plaintiffs in error.

Houston & Bentley for defendant in error.

SIMPSON, C. — Assuming, for the present, that all the other material facts essential to a recovery in this action have been established by proper proof, it remains to determine whether either of the railroad companies that are **Further facts.** plaintiffs in error here are liable in damages for the death of Charles R. Willis. Their liability depends upon the law as applied to the special findings of the jury, and such other facts as are established in the record about which there are no special findings, and not much controversy. Those material to the inquiry are as follows: The Ellsworth, McPherson, Newton, & South-eastern Railway Company was organized to construct a line of railway from El Dorado, in Butler County, to Newton, and "being desirous of immediately constructing a part of its line from El Dorado to Newton, on the thirty-first day of March, 1885, entered into a contract with a corporation known as the 'West Kansas Construction Company,' to construct and equip that part of its line." The construction company was to survey

and locate the line, procure the right of way, build the road-bed, tracks, bridges, side-tracks, etc., and equip the same with engines and cars, in accordance with certain specifications. By the terms of the contract, the railway company, through its officers, were to inspect and accept provisionally the road as completed in sections of five miles or more ; and, as such sections were turned over to and operated by the railway company, it was to haul the supplies for the construction company at specified rates. These provisions were not strictly observed ; and the construction company remained in charge and control of the whole line constructed by them until the road reached Newton, after the death of the deceased, when, on or about the first day of July, 1885, the control of the road passed into the hands of the railroad company. The death of Willis occurred on the twenty-eighth day of June, 1885. The Ellsworth Company also agreed that the construction company should have the privilege of running its trains over the line inspected, and to receive and carry forward construction material, or for other necessary purposes. But trains should be run under police rules and regulations prescribed by the Ellsworth Company, and under its control as to time and speed of movement ; and the construction company was to be liable for all damages to stock, or to other property or persons, which it might cause. These are all the provisions of the contract between the Ellsworth Company and the construction company that seem to have any bearing upon the question of liability of either company for the death of Willis. The special findings of the jury having reference to such liability are all of a negative character ; such as, "they do not know," or answers of similar import, that are evasive in their tone, and not frank responses to direct questions.

It remains for us to determine the liability of these two companies, or either of them, on the terms and conditions of the written contract for construction. It is a familiar principle of law that the Ellsworth Company could not be held responsible for the negligent act of the construction company without it had assumed such responsibility by contract. The evidence shows without question that each one of these contracting parties was a separate and independent incorporation of the State, contracting with each other about the construction and equipment of a line of railroad from El Dorado to Newton, at arm's-length. There must be some affirmative showing, by the terms of the construction contract or by some other evidence, that the Ellsworth Company had made an agreement, in some form, to be or become responsible for the negligent acts of the construction company, before it can be held liable. This is not

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shown by the express terms of the construction contract ; but, on the contrary, that contract contains a provision that declares "the construction company shall be liable for all damages to stock or other property or to persons which it may cause." It seems to us that from the provisions of this contract, supplemented by all the evidence in the case tending to throw light on these provisions, the West Kansas Construction Company was an independent contractor, in the sense that it was only answerable to its employer, the Ellsworth Company, as to the results of the work, and not in the details of its management or the incidents of its prosecution. The test is, Which party controls the work while it is progressing? Who has charge of the management and control of the forces, and who controls the movement and location of the material used in the construction? Who hires the workmen, buys the material, arranges the details, directs and superintends the labor, and is responsible for all failures that do not meet the requirements of the contract, or fulfil the specifications? Who alone is responsible for results produced by separate and independent management? Who has control of the mode and manner of doing the work, subject only to a provision that it must be equal to a fixed rule or a certain degree of excellence? When that is determined, liability is fixed. This contract contains sweeping provisions, indicating its true intent and meaning with respect to this question. The construction company was to survey and locate the line ; procure the right of way ; build the road-bed, tracks, bridges, side-tracks, etc. ; equip the same with engines and cars, in accordance with certain specifications. All this implies a condition of things that necessarily makes the construction company an independent constructor, so far as the provisions of the contract furnish a rule for classification. The contractual relation between the Ellsworth Railroad Company and the construction company excludes all consideration of the question of the one being the servant or agent of the other. The *status* of the construction company is fixed by positive and express agreement as that of an independent contractor. But inasmuch as the terms of the contract provide that the Ellsworth Company, through its officers, were to inspect and accept provisionally the road as completed in sections of five miles or more, and as such sections were turned over to and operated by the Ellsworth Company, it was to haul the supplies for the construction company at specified rates ; and that the construction company should have the privilege of running its trains over the line inspected ; but that trains should be run under the police rules and regulations prescribed by the Ellsworth Company, and under its control as to time and speed of movement,

— that the Ellsworth Company is responsible under the contract. To make it so, it must affirmatively appear that at the time of the death of Willis this particular section of the road had been inspected and accepted under the contract by the Ellsworth Company ; that the train to whose crew Willis belonged was under the control of that company as to the time and speed of movement ; and the other essential elements, such as negligence, etc., necessary to a recovery. But it affirmatively appears that the line of road was not inspected or accepted until after the death of Willis, and there does not appear to be any evidence in the record contradictory of this statement. So that neither by the terms of the contract, nor by the performance of the conditions by which the railroad company might have become liable, can it be said that the Ellsworth Company is in any manner responsible for the death of the intestate. This general conclusion is supported by the cases of *Railroad Co. v. Davis*, 34 Kan. 202 ; s. c., 25 Am. & Eng. R. R. Cas. 305 ; *Railway Co. v. Ritz*, 30 Kan. 31 ; *Hittie v. Railroad Co.*, 19 Neb. 620 ; s. c., 29 Am. & Eng. R. R. Cas. 586 ; *Railway Co. v. Fitzsimmons*, 18 Kan. 34, and authorities cited in that case ; *Hughes v. Railway Co.*, 15 Am. & Eng. R. R. Cas. 100 ; *McCafferty v. Railroad Co.*, 61 N.Y. 178 ; *Pawlet v. Railroad Co.*, 28 Vt. 297 ; *West v. Railroad Co.*, 63 Ill. 545. In the first and leading case in our own court on this subject, that of *Railway Co. v. Fitzsimmons*, it is said, "When a railroad is being constructed, and is in the exclusive possession of and operated by a contractor for its construction, and the railroad company, at the time the injuries complained of are committed, has no control thereof, such company is not liable for the damages resulting from the operation of such railroad. In such case the maxim *respondeat superior* does not apply."

Two propositions have been established, — the *first* being that, by the express terms of the construction contract, the Ellsworth Company is not liable ; and, *second*, that the Ellsworth Company had not inspected and accepted the section of road upon which the injuries complained of happened, and had not control of the construction trains running thereon, so as to charge specified rates for the transportation thereof, and had not control of such trains as to time and speed of movement, so as to make it liable under the conditions of that provision in the construction contract. Counsel for defendant in error insist that the Ellsworth Company is liable, "because it existed only in name at the time of this accident." The precise contention is, that, as the managing and controlling officers of the Ellsworth Company were the same as the Fort Scott Company, and it allowed the Fort Scott Company to exercise its privileges, and by this exercise Willis came to his death, it is therefore responsible. There are some

inherent difficulties in arriving at such a conclusion on this state of facts. If the officers of both companies were identical, and the privileges of the Ellsworth Company were exercised by the Fort Scott Company, by permission of the Ellsworth Company, then certainly one and probably both companies would be liable; but not by reason of the similarity of officers, for that does not fix liability (*Railroad Co. v. Davis*, 34 Kan. 202; s. c., 25 Am. & Eng. R. R. Cas. 305), but by reason of the joint exercise in a negligent and careless manner of the privileges of one. But there is an assumption in the statement that has no support from the evidence in the case; for, at the time the injuries complained of occurred, the Ellsworth Company had no privileges, and had not granted the Fort Scott road any permission to exercise them. So we conclude that there is no ground upon which a liability on the part of the Ellsworth Company can be placed in this case, and it was error to render a judgment against it.

We are now to inquire as to the liability of the St. Louis, Fort Scott, & Wichita Railroad Company to answer in damages for the death of the intestate. This liability is asserted for the following reasons: The jury, in response to special questions submitted, find "that it is a fact that the St. Louis, Fort Scott, & Wichita Railroad did construct the railroad from El Dorado to Newton in some respects." They find that the St. Louis, Fort Scott, & Wichita Railroad Company was not a party to the contract of construction. They say, in response to this question, "Is it not a fact that the St. Louis, Fort Scott, & Wichita Railroad did not direct or control the construction of said road, or the men employed in and about the construction thereof? *Answer.* We do not so understand it." *Question 6.* "Is it not true that the engine and car with which the said Willis was connected at the time of his death, had been before that time leased or rented or hired to the West Kansas Construction Company, for which it was to pay the said railroad company a consideration therefor? *A.* There was no evidence showing that there was any compensation paid for the use of said engine and car." Separate and apart from these evasive findings of the jury, — of which there is not a particle of evidence to support, — there is some record in the evidence tending to show that the crew of the train to which Willis belonged at the time of his death was in the employ of the Fort Scott road, was borne upon its pay-roll, and actually paid by them. In addition to this, it sufficiently appears that the chief engineer and "boss track-layer" of the Fort Scott road acted in the same capacity for the construction company; and testify they were in the employment of both, and this is true of some other employees. It is also true that the loco-

Liability of
Fort Scott
Company.

tive and cars composing the train upon which the injury took place belonged to the Fort Scott Company. There is evidence tending to show, that, whenever circumstances required it, the officers of the construction company could have the use and direction of locomotives and cars of the Fort Scott Company; but exactly on what terms, or under what conditions, does not clearly appear. There being no contract in writing offered that would by its terms create a liability on the part of the Fort Scott road, it was incumbent on the plaintiff below to clearly establish such liability by the facts and circumstances of the case. We are very strongly inclined to doubt if they have done so, but, as this involves disputed questions of fact, we prefer that a jury should once more pass upon them; and we are largely influenced in this desire by the failure of the jury to give frank and intelligent answers to many of the questions propounded to them, and their persistence in this course after the court had directed them to return to their room, and answer direct questions, "yes" or "no." The counsel for the plaintiff in error, when the answers were returned, promptly pursued the proper course, in objecting to their reception; and the trial court vainly tried to have them properly discharge their duties in this regard. We can say, as was said in the case of *Railway Co. v. Fray*, 31 Kan. 739; s. c., 29 Am. & Eng. R. R. Cas. 309, "It may be that the general verdict of the jury was right, but the manner in which the jury answered many of the special questions submitted to them is certainly sufficient to raise great doubts as to the correctness even of their general verdict."

The ordinary administration of justice requires that the facts which are alleged to create a liability on the part of the St. Louis, Fort Scott, & Wichita Railroad Company should be fairly passed upon by a jury who are so free from passion and prejudice, and so mindful of all other obligations, that they will return such frank and direct answers to special questions of fact submitted to them as the evidence warrants, whether their answers result to the benefit of one party or the other. We recommend that the case be reversed, with instructions to grant a new trial.

BY THE COURT. — It is so ordered; all the justices concurring.

Negligence of Independent Contractors. — See *Philadelphia, etc., R. Co. v. Hahn*, 32 Am. & Eng. R. R. Cas. 24; *Murfeldt v. New York, etc., R. Co.*, 25 Ib. 144; *Edmundson v. Pittsburg, etc., R. Co.*, 23 Ib. 423; *New Orleans, etc., R. Co. v. Reese*, 18 Ib. 110; *Hughes v. Cincinnati, etc., R. Co.*, 15 Ib. 100; *Conlon v. Eastern R. Co.*, 15 Ib. 99.

WILLIAMS

v.

PULLMAN PALACE CAR CO. *et. al.*

(*Louisiana Supreme Court, Feb. 13, 1888.*)

Assault by Porter of Sleeping-Car on Stranger. — The obligation of a sleeping-car company for injury to a stranger who enters the car for the purpose of asking the privilege of washing his hands, and is there wantonly and without provocation assaulted and beaten by the porter of a car, is not governed by the principles regulating the liability of common carriers, under the contract of carriage, for like assaults committed by servants on their passengers. The two cases discriminated, and authorities reviewed.

Same. — Principles governing Obligations of Company. — The obligation of the company in such a case, being independent of any contractual relations, is governed by the general principles of the law of master and servant common to all systems of law, and formulated in Louisiana Civil Code as extending to all "damages occasioned by their servants in the exercise of the functions in which they are employed."

Same. — Master's Liability extends to Scope of Servant's Functions. — The earlier doctrine, that, "in general, a master is liable for the fault or negligence of the servant, but not for his wilful wrong or trespass," has been greatly modified in modern jurisprudence, which places the test of the master's liability, not in the motive of the servant, or in the character of the wrong, but in the inquiry whether the act done was something which his employment contemplated, and which, if properly and lawfully done, would have been within the scope of his functions.

Same. — Fact that Party Injured was not a Trespasser Immaterial. — The facts that the party injured was not a trespasser, but was lawfully on defendant's premises, and was properly dealing with the defendant's servant as a servant, do not suffice to fix defendant's liability, if the assault was wanton and entirely foreign to the functions committed to the servant; otherwise a bank or a merchant or a householder would be liable for wanton assaults committed by their clerks or servants upon customers or visitors, which liability would clearly not exist unless the masters were guilty of fault in employing so dangerous a servant.

Same. — Assault Foreign to Porter's Functions. — Company not Liable. — The evidence establishes that the porter offending in this case had been in defendant's employment for three years, and had always conducted himself properly, and bore a good character for amiability, sobriety, and politeness; that porters are mere menial servants, having no police authority whatever, and no connection with the enforcement of the rules of the service, except to report violations of them to the conductor; and that he had no authority to use violence towards any person for any purpose whatever. Hence this wanton assault was entirely foreign to the functions of his employment, and defendant cannot be held responsible therefor.

Same. — From what Ratification of Servant's Act may be Inferred. — Ratification of an unauthorized and unlawful act can only be inferred from acts which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving such

intention. In this case, there being no witness, and plaintiff and the porter giving very different accounts of the affair, ratification of the misconduct imputed by plaintiff cannot be inferred from the retention of the porter, when the defendant so acted because it honestly believed the latter, and thought it just to maintain the *status quo*, at least until judicial determination of the conflict. Nor is the case affected by the fact that the porter was criminally convicted of assault and battery, when, in such a trial, the porter was not heard as a witness in his own defence, and when he might have been so convicted on evidence falling far short of the outrage charged by the plaintiff.

APPEAL from Civil District Court, parish of Orleans; A. L. Tissot, Judge.

Suit by Henry E. Williams, plaintiff and appellee, against Pullman's Palace Car Company for \$25,000. Plaintiff bases his action on his alleged gross maltreatment by one of defendant's servants. Defendant appeals from a judgment condemning it to pay \$2,500.

Alfred Ennis and Percy Roberts for appellant.

Read & Goodale and W. S. Benedict for appellee.

FENNER, J. — This is an action for damages for an injury inflicted by a servant of the defendant, employed as porter on one of its cars. Plaintiff alleges that he had purchased a ticket, and was a passenger on a train of the Louisville, New Orleans, & Texas Railway Company, between Zachary Station and Baton Rouge, in this State; that, having soiled his hands, he went to the wash-basin in the ordinary coach of the train to cleanse them, but found there was no water, and, on application to a porter or brakeman of the car, he was told, "Just step back in the sleeper, and you will find water, towels, comb, and brush;" that thereupon he went back to the sleeper, the door of which was opened by the porter of the sleeping-car, stepped just within the door, and asked said porter if he could wash his hands, when the latter replied in a rude and insulting manner, "Well, sir, if you do, you will pay for it;" that plaintiff jestingly and good-humoredly replied, "You would not think of charging a man any thing to wash, when we have so much water in this country;" whereupon, before plaintiff made any farther advance in the car, the said Porter, John Wiley, suddenly, with a jerk, pulled down plaintiff's hat over his eyes, and with some blunt instrument struck petitioner a violent blow on the head, cutting through the hat into the scalp, making a ghastly wound, and knocking your petitioner senseless out on the platform of the car, where he lay at the imminent peril of his life (the train going at full speed), until rescued by persons who saw him from the adjoining car; the said Wiley having, as soon as he had thus disposed of the petitioner, slammed and fastened the door of the coach, leaving him to his fate. Such are the allegations of the petition, confirmed, almost *totidem verbis*, by

the testimony of plaintiff, who is shown by the record to be a gentleman of social position and excellent character. The porter, of course, tells a very different story, which, if true, would place plaintiff in such precedent fault as would clearly bar his action for damages, even if it did not fully justify the assault and battery in the eye of the criminal law. But the jury evidently believed the plaintiff; and, without needless comment, the evidence in the record furnishes no ground for reversing their conclusion, notwithstanding the almost incredible character of the statement. The case presents for our determination two questions; viz., *First*, Is the defendant responsible for such acts of its servants as those complained of? *Second*, If not originally liable, has it become so, in this case, by ratification of the servant's conduct?

1. Plaintiff was not a passenger on defendant's car, and there was no contractual relation of any kind between them. The case, therefore, does not fall within that numerous class of authorities which enforce the obligations of the common carrier, under its contract of carriage, towards its passengers. Counsel for plaintiff has rested the law of his case almost wholly upon a recent learned decision of the Supreme Court of Maine, where a railway company was held responsible for insult, abuse, and assault by its brakeman upon a passenger, almost as wanton and unprovoked as that charged in the instant case. But a reference to the case shows that the responsibility was imposed solely on the ground of the contract of carriage. Thus, after stating the evidence, the court said, "Upon the evidence, the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was wilful and malicious, and was not, directly or indirectly, authorized by them. They say the substance of the whole case is this: that 'the master is not responsible as a trespasser, unless, by direct or implied authority to the servant, he consents to the unlawful act.' The fallacy of their argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger and the duty which he owes to a stranger. It may be true, that, if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and

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insults of his own servants. . . . This liability of the master is very clearly expressed in a recent case in Massachusetts. The court say, that, wherever there is a contract between the master and another person, the master is responsible for the acts of his servant in executing that contract, although the act is fraudulent, and done without his consent. *Howe v. Newmarch*, 12 Allen, 55. And Messrs. Angell and Ames, in their work on Corporations, sect. 388, say, 'A distinction exists as to the liability of a corporation for the wilful tort of its servant towards one to whom the corporation owes no duty, except such as each citizen owes to every other, and that towards one who has entered into some peculiar contract with the corporation, by which such duty is increased. Thus it has been held that a railroad corporation is liable for the wilful tort of its servants, whereby a passenger on the train is injured.' " *Goddard v. Railroad Co.*, 57 Me. 202. The court, in its opinion, refers to many authorities, all tending in the same direction; but further quotation is needless. Perhaps the principle was never more clearly expressed, or placed on a sounder basis of reason, than by our own court, which has thus formulated it: "When the proprietors of vessels use them for the purpose of carrying passengers for money, they subject themselves to the same responsibility for a breach of duty in their officers to those passengers as they would for their misconduct in regard to merchandise committed to their care. No satisfactory distinction can be drawn between the two cases." *Keene v. Lizardi*, 5 La. 431.

The absence of any contractual relation between plaintiff and defendant removes this case from the application of the line of authorities above indicated. The responsibility of defendants, if it exists, must be found in the general principles of the law of master and servant, as applicable to all masters similarly situated. The Civil Code of this State enunciates the rule of *respondeat superior* in terms which exactly correspond to the rule of the common as well as the civil law: "Masters and employers are answerable for the damages occasioned by their servants and overseers in the exercise of the functions in which they are employed." As is well said by Judge Cooley, "It will readily occur to every mind that the master cannot, in reason, be held responsible generally for any wrongful conduct a servant may be guilty of. A liability so extensive would make him guarantor of the servant's good conduct, and would place him under a responsibility which prudent men would hesitate to assume." The earlier doctrine of the common law affirmed the rule, that, "in general, the master is liable for the fault or negligence of the servant, but not for his wilful wrong or trespass." 2 Hil. Torts, 524; *McManus v. Crickett*, 1 East, 106; *Sharrod v. Railway*, 4

Exch. 580; *Roe v. Birkenhead*, 7 Exch. 36; *Wright v. Wilcox*, 19 Wend. 345. But the tendency of later jurisprudence is to discard this distinction, and to recognize the liability of the master, not only for the negligence of his servants, but also for their torts, when done within the scope of their employment, or, in the language of the Code, "in the exercise of the functions in which they are employed." It matters not that the acts are wilful and tortious, nor that they have been committed in disobedience of the express orders of the master; if they have been done in the exercise of the functions of the employment, the master is responsible. "The test of the master's responsibility," says Cooley, "is not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name. Cooley, Torts, 536. The great difficulty in applying these principles lies in defining what acts properly fall within the scope of the servant's employment. The evidence in this case establishes that the porters employed in defendant's service are mere menials, employed to clean up the car, and keep it in order, and to wait upon the passengers; having no police authority whatever, and no connection with the enforcement of the rules of the service, except to report violations of them to the conductor. Any thing more completely outside of "the functions in which he was employed" than the assault committed on the plaintiff could hardly be conceived. If it had been his duty forcibly to prevent the plaintiff from entering the car, or to put him out at all, and in performing this duty he had used wanton and needless violence, inflicting injury, defendant might have been responsible. But he had no such duty or authority. We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to hire the privilege, and that in addressing the porter he was dealing with him as a servant of the company. This emphasizes the outrage to which he was subjected, but would be a dangerous ground for holding the employer responsible. A person has a right to enter a bank for the purpose of collecting a check, and to present it to the paying teller for payment; but if, on such presentation, the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods; but if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Or if one, on lawful business, should knock at the door of any private house, and, on asking the servant who answered the call for permission

to see the master, the servant should assault and beat him, would the master be responsible? Clearly, in all such cases the lawfulness of the party's conduct, and the fact that the injury was received while he was properly dealing with the servant as a servant, would not suffice to bind the master, unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant. We cannot distinguish this case from the ones above indicated. The evidence exonerates the defendant from any fault in the employment of Wiley as a porter. He had been in the employment for three years, and during all that time had borne a good character for sobriety, amiability, and politeness. A case quite similar to this is found in our own reports, where the lock-keeper of a canal, whose duties were to keep the locks, to open and close them, and to collect the tolls, assaulted and cruelly beat an oyster trader, under the pretext that he had not paid his toll, and the canal company was sued for these tortious acts; but this court rejected the demand, saying, "When an agent, losing sight of the object for which he is employed, commits wrong and causes damage, the principal is no more answerable for them than any stranger. As to such wrongs, the agent must be considered as acting of his own will, and not in the course of his employment, or under any implied authority of his principal." *Ware v. Barataria*, 16 La. 169. In another case it was said, "The rule seems to be, that when the agent, acting in the capacity bestowed upon him by the corporation, and in the discharge of some duty or employment directed by the employer or incidental to his situation, does an act that causes damage, the corporation is responsible; but where the agent does any act of his own free will, without reference to his functions as a corporate agent, the corporation is not responsible. For example, if a person should go into a banking-house or an insurance office, and there get into difficulty or dispute, in relation to business of the corporation, with an agent or officer, and an assault and battery should ensue, we suppose it would not be seriously contended that the bank was answerable in damages, unless there was some express recognition of the act. *Etting v. Bank*, 7 Rob. (La.) 459; *Dyer v. Rieley*, 28 La. Ann. 6; *Pierce, R. R.* 279; *Field, Corp.* sects. 524, 623; *Isaacs v. Railroad Co.*, 47 N. Y. 122; *Railroad Co. v. Baum*, 25 Ind. 72; *Railroad Co. v. Harrison*, 48 Miss. 112; *Flower v. Railroad Co.*, 69 Pa. St. 210. Under these views, while we share plaintiff's indignation at the outrage committed on him, we cannot fix the duty of reparation on the innocent defendant, upon whom it is not imposed by the letter or spirit of the law.

2. It is claimed, however, that, if not originally responsible, the

defendant has ratified the act of the porter by retaining him in its employ after knowledge of his conduct. It is incredible that the company should have intended to approve or ratify such conduct as that attributed to the porter. Ratification can only be inferred from acts which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving any such intention. *Breaux v. Savoie*, 39 La. Ann. —, 1 South. Rep. 614, and authorities there cited. Now, in this case, there were no witnesses to the incident, except the parties thereto. They gave very different accounts of it. The defendant, prompted by its previous knowledge of the porter, believed his story, and did not believe that of plaintiff. It illustrated the sincerity of its conviction by the very fact of retaining the porter; for if, after this incident, the porter had again committed a similar outrage, defendant would undoubtedly have subjected itself to a much more dangerous claim for damages. If it honestly believed that the porter was innocent of the outrageous conduct charged against him, his retention was, under such belief, an act of courageous justice, and certainly presents no element of ratification. Nor is the case affected by the fact that the porter was criminally prosecuted and convicted for assault and battery. His own testimony was not, under the law in force, admissible in that prosecution; and, moreover, he might have been convicted on evidence falling far short of the outrage charged by plaintiff. The porter had been discharged for other causes before the trial of this suit; and we think the defendant company cannot be charged with ratification of such an outrage because, in the conflict between the statements of the parties, it believed its own servant, and, at all events, thought it just to preserve the *status quo* until the judicial determination of the dispute.

Ratification
not to be in-
ferred.

It is therefore ordered, adjudged, and decreed that the verdict of the jury and the judgment appealed from be annulled, avoided, and reversed, and there be now judgment in favor of defendant, and rejecting the demand of plaintiff, at his cost in both courts.

Rehearing refused, March 5, 1888.

Liability of Company for Injuries to, and Assaults upon, Passengers. — See *Spohn v. Missouri Pac. R. Co.*, and note, 26 Am. & Eng. R. R. Cas. 252-256; *Chicago & A. R. Co. v. Pillsbury*, and note, 26 Ib. 241-256; *Felton v. Chicago, etc., R. Co.*, 27 Ib. 229; *Chicago & A. R. Co. v. Pillsbury*, 31 Ib. 24.

WILLIAMS

v.

PULLMAN PALACE CAR CO. *et al.**(Louisiana Supreme Court, April 16, 1888.)*

When Servants of Sleeping-Car Company will be considered Servants of Railway Company. — In cases involving the responsibility of a common carrier, such as a railway company, for injuries sustained by one of its passengers, the porter and other employees of the Pullman Car Company, forming part of the railway company's train, will be considered as the servants and employees of the railway company.

Same. — Liability of the Company for their Negligence. — Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, is the negligence of the railroad company.

Assault by Servant on Passenger. — Liability of Company. — A railroad company is liable in damages for a wanton and malicious assault by one of its servants on a passenger.

Same. — Assault on Passenger by Sleeping-Car Porter. — A railway company is responsible for injuries received by one of its passengers at the hands of a porter of a sleeping-car forming part of the railway company's train, if it appears that said passenger was not a trespasser on the sleeping-car.

APPEAL from Civil District Court, parish of Orleans; A. L. Tissot, Judge.

Suit by Henry E. Williams against the Pullman Palace Car Company and the Louisville, New Orleans, & Texas Railway Company, for \$25,000, for injuries inflicted upon him by a porter of defendant's car. He appeals from judgment rejecting his demand against the railway company. For appeal from judgment in his favor against the Pullman Car Company, see 3 South. Rep. 631.

W. S. Benedict and Reade & Goodale for appellant.

Percy Roberts and Farrar & Kruttschnitt for appellee.

POCHE, J. — This appeal presents plaintiff's claim for damages against the Louisville, New Orleans, & Texas Railway Company for personal injuries received by him at the hands of the porter of the Pullman Car Company on the 23d of November, 1885, while he was a passenger of the railway company between Zachary Station and Baton Rouge. His demand was against both companies *in solido*; but, on motion, separate trials were granted, resulting in a verdict in his favor against the Pullman Company, and in the other case in favor of

the railway company. On appeal to this court the judgment in his favor against the Pullman Company was reversed, and his demand rejected. His present appeal is from the judgment below which rejected his demand against the railway company. The pleadings and the evidence are the same in both cases ; and, as they are stated with precision and at length in our opinion in the first case, they need not be repeated here. See *Williams v. Car Co.*, *ante*, p. 407. It is in proof, and it is not disputed, that plaintiff had paid his fare as a passenger on the defendant's train, and that he was, as such, entitled to all the privileges and to the protection which a common carrier or transporter owes to its passengers. Defendant's main contention is, that plaintiff was a trespasser in the Pullman car, and that he thereby forfeited his right to protection from the railway company, according to the terms of his contract of transportation. Under our understanding of the issues presented by the pleadings, plaintiff's right of recovery against the railway company hinges upon the proper solution of the two following questions : (1) Can the railway company be held liable for the acts of an employee of the Pullman Car Company under any circumstances ? (2) Was plaintiff a trespasser on the Pullman car when he was struck by the porter, or was he then entitled to the full protection of the railway company, as one of its passengers ?

I. An extended review of decisions of American courts has brought to our attention several adjudications which hold the affirmative of the first question which we are called to discuss in this case. In one of those decisions the following principle is announced : "Passengers upon a railroad taking a drawing-room car have a right to assume that they are there under a contract with the railroad corporation, and that the servants in charge of the car are its servants, for whose acts in the discharge of their duty it is liable." *Thorpe v. Railroad Co.*, 76 N. Y. 402. The substantial facts of that case were, that a passenger on one of the defendant's trains, finding all the seats occupied in the ordinary or day coaches, walked into a drawing-room car attached to, and forming part of, the train, and took a seat therein. When called upon by the porter to pay the extra charge for a seat in that car, he refused to pay the sum demanded, for the reason that he could find no seat elsewhere, whereupon the porter attempted to eject him from the car, and for this assault he brought a suit for damages. On appeal from a judgment in his favor, and against the railway company, the Court of Appeals of New York recognized his action, and enforced the liability of the railway company for the acts of the porter or employee of the drawing-room car company. Among other things, the court said, "The general

**Defendant's
liability for act
of porter.
Authorities.
*Thorpe v. Rail-
road Co.***

principle is well settled, that, to make one person responsible for the negligent or tortious act of another, the relation of principal and agent, or master and servant, must be shown to have existed at the time, and in respect to the transaction between the wrongdoer and the person sought to be charged. The defendant relies upon the absence of that relation between the porter and the company as conclusive against its liability for his acts. But we are of opinion that this defence is not available to the defendant ; or, rather, that the persons in charge of the drawing-room car are to be regarded and treated, in respect to their dealings with passengers, as the servants of the defendant, and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company." Sanctioning the same rule, the Supreme Court of the United States enforced the liability of a

Same. Rule of
U. S. Supreme
Court. Penn-
sylvania Co. v.
Roy. railway company for damages received by one of its passengers while he occupied a seat in a Pullman Company car attached to the defendant's train. The accident had been caused by the falling on the head of the passenger of the upper berth of the sleeping-car, and was due to the unsafe condition of the brace or arm which supported the upper berth, and which was afterwards found to be broken. *Pennsylvania Co. v. Roy*, 102 U. S. 451 ; s. c., 1 Am. & Eng. R. R. Cas. 225. In dealing with the question which now concerns us, the court said, "The undertaking of the railroad company was to carry the defendant in error over its line, in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car, with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, constituting a part of the carrier's train, for an additional sum paid to the company owning such car. As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided, at its own expense, a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligation arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. . . . For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and *porter, were, in law, the servants and employees of the railroad company.* [*Italics are ours.*] Their negligence, or the negligence of either of them,

as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company." In a case predicated on similar facts, the Supreme Court of Ohio applied the same rule. *Railroad Co. v. Walrath*, 38 Ohio St. 461 ; s. c., 8 Am. & Eng. R. R. Cas. 371.

Commenting on the preceding and other adjudications, Wood, in his work on Railway Law, has formulated the rule as follows: "The practice of running trains controlled by two distinct and separate corporations has become quite common in this country; and, as a result, questions as to the relation or liability of these corporations will be likely often to arise. It has been held in several cases, that when a passenger has purchased a ticket of a parlor-car company, entitling him to ride in its car, and also a passage ticket of the railway company, the railway company is to be regarded as liable for the negligence of the parlor-car company, and that its servants are to be treated as the servants of the railway company in every thing that regards the safety and security of the passenger." 3 Wood, Ry. Law, p. 1442, sect. 366.

Wood's Railway Law.

Believing that, in a question of such vast importance on matters of litigation likely to arise in all parts of the American Union, this court should seek to place its rulings and jurisprudence in line and in harmony with those of the Supreme Court of the United States and of the courts of last resort of our sister States, wherever those decisions do not militate against the principles of our special and exceptional system of laws, we deem it our duty, without hesitation, to adopt the conclusions which so clearly flow from the highly respectable authorities to which we have just referred, and from which we have thought it proper and useful to make the foregoing copious quotations. Applied to this case, in which it appears that the Pullman car was attached to the defendant's train, under the same circumstances, rules, and regulations, and for the same purposes, as shown in the cases hereinabove mentioned, the rule of law, thus sanctioned, leads to the legal conclusion that, for the purposes of this contention, the porter of the sleeping-car, by whom Williams was stricken down and injured, must be treated as being, at the time, a servant or employee of the defendant company, and, as such, intrusted with the duty of contributing, in the performance of his legitimate duties, to the safety and security of the passenger whom the railway company had undertaken to carry safely over its line. Hence it follows that the railway company must be held liable for injuries sustained by one of its passengers through the negligence or fault or other acts of the porter in question; and, under well-established jurisprudence, it is

Sleeping-car porter was servant of railroad company.

equally clear and logical. that such liability extends to and embraces injuries inflicted on the passenger by means of a wilful and malicious assault by a railroad employee on the passenger. That responsibility is the subject of a very able and masterly discussion by the Supreme Judicial Court of Maine in the Case of *Goddard*, 57 Me. 202, in which a passenger was allowed exemplary as well as compensatory damages for gross insult heaped upon him by a brakeman on the train on which he was then travelling. In that opinion, from which we made copious extracts in our previous decision (3 South. Rep. 631), the court enforced the rule that "a common carrier of passengers is responsible for the wilful misconduct of his servants towards its passenger." "A passenger who is assaulted and grossly insulted in a railway car by a brakeman employed on the train, has a remedy therefor against the company." In *Railroad Co. v. Vandiver*, 42 Pa. St. 365, the railway company was held liable for injuries inflicted on a passenger by a violent ejectment from the train. A like responsibility was decreed against the railroad company for injuries sustained by a lady passenger in a general fight between drunken passengers in the coach in which she occupied a seat, on the ground that the conductor had not used the proper means to quell the disturbance. *Railway Co. v. Hinds*, 53 Pa. St. 512. Our own jurisprudence has sustained an action by a lady passenger against the owner of a vessel for insulting and abusive language used to her and about her by an employee of the common carrier. The principle is thus summarized in that opinion: "The master of a vessel is liable for the indecent and inhumane conduct of himself and of his crew, enacted by him towards a passenger." "Owners of vessels carrying passengers for money are subject to the same responsibility for a breach of duty by their officers to the passengers as they would be in regard to merchandise committed to their care." *Keene v. Lizardi*, 5 La. 431. We therefore conclude that the case is with plaintiff, unless it should appear that he was a trespasser on the Pullman car when the incident occurred resulting in his injuries.

2. And this brings us to the consideration of the second question involved in the controversy. Under the result of our examination of the evidence as announced in our previous opinion, this question offers no difficulty in the present case. We said on that subject, "We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to have the privilege, and that, in addressing the porter, he was dealing with

Same.
Railroad
company
liable for his
assault.

Plaintiff not a
trespasser in
sleeping-car.

him as a servant of the company." A second examination of the record has had the effect of confirming the correctness of that conclusion. The preponderance of the evidence on that point, although very conflicting, shows, to our entire satisfaction, that plaintiff did ask permission of the porter to wash his hands, and that, after an exchange of a few unpleasant words, the porter struck him on the head with a blunt instrument while plaintiff was standing at the threshold of the door of the Pullman car. He was stunned by the blow, which felled him to the platform, whence he was picked up and brought to the forward car by one of his friends. His testimony as to the main features of the incident is corroborated by that of two other witnesses, although no witness saw the whole incident. Hence we conclude that the attack was unprovoked, unjustifiable, and wilful on the part of the porter, for whose conduct the defendant company must be held liable in damages. As the Pullman Car Company, the immediate and direct employer or master of the wrong-doer, has been shielded from responsibility by our previous decree, the case may be a hard one on the defendant; but, under the authorities by which we have been guided, the hardship appears inevitable. Our ruling in that case rested on a pivotal feature, that there existed no contractual relations between plaintiff and the company. Our conclusions find ample support in the decision of the case in 76 N. Y., hereinabove referred to, in which the railway company was made to respond for the ejectment of a passenger from the drawing-room car in which he claimed the right of occupying a seat without paying therefor. On this point we quote from the opinion of the Supreme Court of the United States in Roy's case, 102 U. S. 458; s. c., 1 Am. & Eng. R. R. Cas. 225, the following utterances: "Whether the Pullman Car Company is not also and equally liable to the defendant in error, or whether it may not be liable over to the railroad company for any damages which the latter may be required to pay on account of the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any questions between it and others." Under all the circumstances of the case, we hold that plaintiff is entitled to recover damages in the sum of \$1,000.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and the verdict of the jury set aside; and it is now ordered that plaintiff do have and recover judgment of the defendant, the Louisville, New Orleans, & Texas Railway Company, in the sum of \$1,000, and for costs in both courts.

See *Williams v. Pullman P. Car Co.*, and note, *ante*.

Liability of Railway Company for Acts of Servants of Sleeping-Car Company. — See *Cleveland, etc., R. Co. v. Walrath*, 8 Am. & Eng. R. R. Cas. 371; *Roy v. Pennsylvania R. Co.*, and note, 1 Ib. 225, 233.

McDONALD

v.

STATE.

(*Alabama Supreme Court*, 1887.)

Provision for licensing Locomotive Engineers not a Regulation of Interstate Commerce. — The Act, approved Feb. 28, 1887, which requires all railroad engineers engaged in running a train of cars or engine used for the transportation of persons, passengers, or freight, on the main line of any railroad in this State, to be examined and licensed by a board appointed by the governor, and makes it a misdemeanor punishable by fine and hard labor for any engineer to act in that capacity without such examination and license (Sess. Acts 1886-87, pp. 100-102), is not a regulation of interstate commerce, but an internal police regulation, which the State had undoubted power to enact as a law.

Same. — Judicial Power. — Due Process of Law. — The said Act does not confer judicial powers on the board of examiners, nor does it deprive the citizen of his liberty or property without due process of law.

APPEAL from City Court, Montgomery County.

Prosecution for operating locomotive engine without license.

Lorenzo McDonald, the appellant, was arrested on affidavit before the county court of Montgomery, and, upon conviction therein, appealed to the city court of Montgomery. The complaint filed in the latter court charged that "he, being an engineer of a railroad train in said State, did drive, operate, or engineer a train of cars or engine upon the main line or roadbed of the Western Railway of Alabama, which said Western Railway was a railroad in said State, and was at the time used for the transportation of persons, passengers, or freight, without having first undergone an examination, and obtained a license, as required by law." A second count in the indictment charges the same offence, concluding, "without first having applied to the board of examiners provided by law, to be examined by said board, and without having first been examined by said board, or by two or more members thereof, in practical mechanics, and concerning his knowledge of operating a locomotive engine, and his competency as an engineer, as required by law." The defendant pleaded not guilty.

The evidence tended to show, that on May 24, 1887, the defendant was an engineer in the State of Alabama, on a railroad therein ; that he was not, nor had he been, so employed in said State previous to Jan. 28, 1887 ; that he had never applied to the board of examiners provided by law, nor been examined, nor obtained a license as an engineer ; that on said May 24, 1887, he operated an engine and train in said State on the Western Railway of Alabama, and in the county of Montgomery ; that the Western Railway of Alabama was and is operated under one management with the Atlanta & West Point Railroad in the State of Georgia, the two railroads forming a continuous line from Montgomery, Ala., to Atlanta, Ga., for the transportation of passengers and freight and the United States mail ; that said train, so operated by defendant, was a through train from Atlanta to Montgomery ; that said engine and train were and are used in transporting freight shipped from Atlanta and points beyond, to Montgomery and points beyond, in the State of Alabama, and in other States west and south of Alabama.

This being substantially all the evidence, the court refused to give the general charge at the request of defendant, and gave the general charge at the request of the State. The defendant excepted to such actions of the court. Verdict and judgment having been rendered against the defendant, he appeals to this court.

The first two sections of said Act are as follows : "Section 1. That it shall be unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train of cars or engine upon the main line or road-bed of any railroad in this State which is used for the transportation of persons, passengers, or freight, without first undergoing an examination once, and obtaining a license as hereinafter provided. Sect. 2. That before any locomotive engineer shall operate or drive an engine upon the main line or road-bed of any railroad in this State used for the transportation of passengers, of persons, or freight, he shall apply to the board of examiners hereinafter provided for in this Act, and be examined by said board, or by two or more members thereof, in practical mechanics, and concerning his knowledge of operating a locomotive engine, and his competency as an engineer." Acts Ala., 1886-87, pp. 100-102.

Troy, Tompkins, & Loudon (with whom were *Thomas G. Jones* and *George P. Harrison*) for appellant.

T. N. McClellan, Attorney-General, *contra*.

SOMERVILLE, J. — The Act of 1886-87, pp. 100-102, requires locomotive engineers in this State to be licensed, after examination as to competency and fitness, by a board authorized to be

appointed by the governor for that purpose. Acts 1886-87, pp. 100-102. It is insisted that the Act is unconstitutional for several reasons.

The first objection is, that it is a regulation of commerce between the States, and, for this reason, violative of the clause of the United States Constitution which vests in Congress the power to regulate such commerce.

Engineer's license more internal police regulation.

In our opinion it is a mere internal police regulation, which was competent to be provided for by the State, as a proper mode of preserving the safety of the travelling public, and other persons, whose lives may well be imperilled by the negligence of ignorant and incompetent engineers. It incidentally affects interstate commerce, but does not amount to a regulation, any more than laws licensing, by State authority, pilots of vessels engaged in such commerce, which have always been held free from constitutional objection. The laws of the several States have undertaken, not only to license pilots in such cases, but have gone so far as to regulate the whole subject of pilotage and pilots, — fixing their qualifications, employment, and pay, including the tender of services, and, on refusal to employ, authorizing the recovery of half pay. These laws have been sustained, not on the ground that Congress had recognized them as valid, for it is clear that no such recognition could confer any constitutional power on the States which they did not already possess, but upon the ground that they were necessary police regulations, having in view the public safety, or, if regulations of commerce in a certain sense, they were local regulations, of such a nature as to be permissible until Congress itself undertook to exercise the same power by legislating on the subject. *Cooley v. Board of Wardens of Philadelphia*, 12 How. 323; *Ex parte Niel*, 13 Wall. 236.

There are many police regulations of this nature, incidentally affecting commerce, which have been sustained by the courts.

It is well settled that the States may pass laws requiring railroads running from one State to another to fence their tracks, to ring a bell, or blow a whistle, on approaching a crossing or highway, to erect gates or bridges, and keep flag-men at dangerous places on highways, to stop for reasonable times at certain stations, to fix and post printed time-tables, rates of fare and freights, and other things of like character having reasonably in view the prevention of fraud and extortion, or other injury, and the preservation of the safety of the public. *Railroad Co. v. Fuller*, 17 Wall. 560; *Mobile, etc., R. Co. v. State*, 51 Miss. 137; *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Amer. Rep. 555; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Railroad Com'rs v. Portland, etc., R.*

State may make police regulations for railroads.

Co., 63 Me. 269, 18 Amer. Rep. 208; Davidson *v.* State, 4 Tex. App. 545, 30 Amer. Rep. 166; Tied. Lim. Police Powers, sect. 194; Cooley, Const. Lim. (5th ed.) *579 *et seq.*

The exaction of a license in such a case does not impose a direct burden upon interstate commerce, or interfere directly with its freedom. It only "acts indirectly upon the business through the local instruments to be employed, after coming within the State." It does not belong to that class of subjects which are national in their character, and admit of but one system of regulation for the whole country, having in view the prevention of unjust discrimination, and the preservation of the freedom of transit and transportation from one State to another. *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557; s. c., 26 Am. & Eng. R. R. Cas. 1, and cases there cited.

License does not impose burden on interstate commerce.

The case of *Robbins v. Shelby Co. Taxing District*, 150 U. S. 489; s. c., 16 Am. & Eng. Corp. Cas., does not conflict with the foregoing views. The license there exacted of foreign drummers was held to be a tax on interstate commerce. It was not a police regulation. Even in that case the stronger reasoning, in our judgment, is with the able opinion of Chief Justice Waite, concurred in by Justices Field and Gray. In *Port of Mobile v. Le-loup*, 76 Ala. 401, we sustained as constitutional an ordinance of the port of Mobile imposing a license tax upon a telegraph company doing business in that city, between this and other States, which was interstate commerce. In this we followed as authority the case of *Osborne v. Mobile*, 16 Wall. 479, in which the United States Supreme Court sustained a similar license on an express company under like circumstances. The same question had been before decided in *Southern Exp. Co. v. Mayor, etc., Mobile*, 49 Ala. 404. In *City of New Orleans v. Eclipse Tow-Boat Co.*, 33 La. Ann. 647, 39 Amer. Rep. 279, in like manner a city ordinance exacting a license fee from the owner of tow-boats running on the Mississippi River, to and from the Gulf of Mexico, was held not unconstitutional as a regulation of commerce, upon authority of the same decision. In *American Union Tel. Co. v. W. U. Tel. Co.*, 67 Ala. 26, we held that the provisions of our Constitution prohibiting foreign corporations from doing business in this State without having at least one known place of business, and an authorized agent therein, was a legitimate exercise of the police power, and was not a regulation of commerce.

Authorities reviewed.

The case of *Yick Wo v. Hopkins*, 118 U. S. 356; s. c., 13 Am. & Eng. Corp. Cas. 187, does not, in our opinion, lend any favor to the contention of appellant. The municipal ordinance there pronounced invalid, vested in the board of supervisors the arbi-

trary power to license public laundries at their own mere will and pleasure, without regard to discretion in the legal sense of the term, and without regard to the *fitness* or *competency* of the persons licensed, or the propriety of the locality selected for carrying on such business. Properly construed, this case favors the views above expressed by us.

2. The other objections to the law based on 'constitutional grounds, are, in our opinion, not maintainable. It does not confer judicial power on the board appointed by the governor, nor does it deprive the citizen of his liberty or property without due process of law. The vesting by legislative authority of the power to license various occupations and professions requiring skill in their exercise, or the observance of the law of hygiene, or the like, have never been construed to be obnoxious to these objections.

It has been uniformly held that laws providing by accustomed modes for the licensing of physicians, lawyers, pilots, butchers, bakers, liquor dealers, and, in fact, all trades, professions, and callings, interfere with no natural rights of the citizen secured by our Constitution. Mayor, etc., *Mobile v. Yuille*, 3 Ala. 137; *Dorsey's Case*, 7 Port. (Ala.) 295; *Cooper v. Schultz*, 32 How. Pr. 107, and authorities cited; *Coe v. Schultz*, 47 Barb. 64; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Reynolds v. Schultz*, 34 How. Pr. 147; *People v. Medical Society of N. Y.*, 3 Wend. 426; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 627; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Slaughter-House Cases*, 10 Wall. 273.

The rulings of the court accord with these views, and the judgment is affirmed.

Constitutionality of State and Municipal Taxes and Licenses as Regulations of Interstate Commerce. — This subject has been fully treated in the Am. & Eng. Corp. Cas. See *Ex parte Asher*, and note, 18 Am. & Eng. Corp. Cas. 533; *Robbins v. Taxing District*, 16 Am. & Eng. Corp. Cas. 1; *Philadelphia Fire Ass. v. New York*, 15 Am. & Eng. Corp. Cas., and note, 421; *City of Kansas v. Collins*, 11 Am. & Eng. Corp. Cas. 314; *State Centre v. Barenstein*, 11 Am. & Eng. Corp. Cas. 413; *Braun v. Chicago*, and note, 5 Am. & Eng. Corp. Cas. 298; *Newton v. Atchison*, 3 Am. & Eng. Corp. Cas. 447; *Van Hook v. Selma*, and note, 2 Am. & Eng. Corp. Cas. 23; *Vosse v. Memphis*, 2 Am. & Eng. Corp. Cas. 23; *Graffy v. Rushville*, 15 Am. & Eng. Corp. Cas. 456.

SMITH

v.

ALABAMA.

(124 U. S. 465.)

Interstate Commerce. — Licensing Engineers. — The Legislature of Alabama enacted a law entitled “an Act to require locomotive engineers in this State to be examined and licensed by a board to be appointed for that purpose,” in which it was provided that it should be “unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train of cars or engine upon the main line or road-bed of any railroad in this State which is used for the transportation of persons, passengers, or freight, without first undergoing an examination and obtaining a license, as hereinafter provided.” The statute then provided for the creation of examiners, and prescribed their duties, and authorized them to issue licenses, and imposed a license fee, and then enacted “that any engineer violating the provisions of this Act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months.” Plaintiff in error was an engineer in the service of the Mobile & Ohio Railroad Company. His duty was to “drive, operate, and engineer” a locomotive engine drawing a passenger train on that road, regularly plying in one continuous trip between Mobile in Alabama and Corinth in Mississippi, and *vice versa*, 60 miles of which trip was in Alabama, and 265 in Mississippi. He never “drove, operated, or engineered” a locomotive engine hauling cars from one point to another point exclusively within the State of Alabama. After the statute of Alabama took effect, he continued to perform such regular duties without taking out the license required by that Act. He was proceeded against for a violation of the statute, and was committed to jail to answer the charge. He petitioned a State court for a writ of *habeas corpus*, upon the ground that he was employed in interstate commerce, and that the statute, so far as it applied to him, was a regulation of commerce among the States, and repugnant to the Constitution of the United States. The writ was refused, and the Supreme Court of the State of Alabama on appeal affirmed that judgment. *Held*, —

(1) That the statute of Alabama was not, in its nature, a regulation of commerce, even when applied to such a case as this;

(2) That it was an Act of legislation within the scope of the powers reserved to the States to regulate the relative rights and duties of persons within their respective territorial jurisdictions, being intended to operate so as to secure safety of persons and property for the public;

(3) That so far as it affected transactions of commerce among the States, it did so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and that, in the particulars in which it touched those transactions at all, it was not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence;

(4) That so far as it was alleged to contravene the Constitution of the United States, the statute was a valid law.

ERROR to the Supreme Court of the State of Alabama.

The case, as stated by the court, was as follows :—

This is a writ of error bringing into review a judgment of the Supreme Court of the State of Alabama, affirming a judgment of the city court of Mobile. The proceeding in the latter court was upon a writ of *habeas corpus* sued out by the plaintiff in error, seeking his discharge from the custody of the sheriff of Mobile County, in that State, under a commitment by a justice of the peace upon the charge of handling, engineering, driving, and operating an engine pulling a passenger-train upon the Mobile & Ohio Railroad used in transporting passengers within the county of Mobile and State of Alabama, without having obtained a license from the board of examiners appointed by the governor of said State, in accordance with the provisions of an Act entitled "An Act to require locomotive engineers in this State to be examined and licensed by a board to be appointed by the governor for that purpose," approved Feb. 28, 1887, and after more than three months had elapsed from the date of appointment and qualification of said board. The plaintiff in error, upon complaint, was committed by the examining magistrate to the custody of the sheriff to answer an indictment for that alleged offence. The ground of the application for discharge upon the writ of *habeas corpus* in the city court of Mobile was, that the Act of the General Assembly of the State of Alabama, for the violation of which he was held, was in contravention of that clause of the Constitution of the United States which confers upon Congress power to regulate commerce among the States.

The facts, as they appeared upon the hearing upon the return of the writ, are as follows: The petitioner at the time of his arrest, on July 16, 1889, within the county of Mobile, was a locomotive engineer in the service of the Mobile & Ohio Railroad Company, a corporation owning and operating a line of railroad forming a continuous and unbroken line of railway from Mobile, in the State of Alabama, to St. Louis, in the State of Missouri, and as such was then engaged in handling, operating, and driving a locomotive engine, attached to a regular passenger-train on the Mobile & Ohio Railroad, within the county and State, consisting of a postal car carrying the United States mail to all parts of the Union, a Southern express car containing perishable freight, money packages, and other valuable merchandise destined to Mississippi, Tennessee, Kentucky, and other States, passenger coaches, and a Pullman palace sleeping-car occupied by passengers to be transported by said train to the States of Mississippi, Tennessee, and Kentucky. The petitioner's run, as a locomotive engineer in the service of the Mobile & Ohio Railroad Company, was regularly from the city of Mobile, in the State of Alabama,

to Corinth, in the State of Mississippi, sixty miles of which run was in the State of Alabama, and two hundred and sixty-five miles in the State of Mississippi; and he never handled and operated an engine pulling a train of cars whose destination was a point within the State of Alabama when said engine and train of cars started from a point within that State. His train started at Mobile, and ran through without change of coaches or cars on one continuous trip. His employment as locomotive engineer in the service of said company also required him to take charge of and handle, drive, and operate an engine drawing a passenger-train which started from St. Louis, in the State of Missouri, destined to the city of Mobile, in the State of Alabama, said train being loaded with merchandise, and occupied by passengers, destined to Alabama and other States; this engine and train he took charge of at Corinth, in Mississippi, and handled, drove, and operated the same along and over the Mobile & Ohio Railroad through the States of Mississippi and Alabama to the city of Mobile. It frequently happened that he was ordered by the proper officers of the said company to handle, drive, and operate an engine drawing a passenger-train loaded with merchandise, carrying the United States mail, and occupied by passengers, from the city of Mobile, in Alabama, to the city of St. Louis, in Missouri, being allowed two lay-overs; said train passing through the States of Alabama, Mississippi, Tennessee, Illinois, and into the State of Missouri.

It was admitted that the petitioner had not obtained the license required by the Act of the General Assembly of the State of Alabama of Feb. 28, 1887, and had not applied to the board of examiners, or any of its members, for such license, and that more than three months had elapsed since the appointment and qualification of said board of examiners, the same having been duly appointed by the governor of the State under the provisions of said Act.

The statute of Alabama the validity of which is thus drawn in question, as being contrary to the Constitution of the United States, and the validity of which has been affirmed by the judgment of the Supreme Court of Alabama now in review, is as follows:—

“AN ACT to require locomotive engineers in this State to be examined and licensed by a board to be appointed by the governor for that purpose.

“SECTION 1. *Be it enacted by the General Assembly of Alabama,* That it shall be unlawful for the engineer of any railroad train in this State to drive or operate or engineer any train of cars or engine upon the main line or road-bed of any railroad in this State which is used for the transportation of persons, pas-

sengers, or freight, without first undergoing an examination and obtaining a license as hereinafter provided.

"SECT. 2. *Be it further enacted*, That before any locomotive engineer shall operate or drive an engine upon the main line or road-bed of any railroad in this State used for the transportation of persons or freight, he shall apply to the board of examiners hereinafter provided for in this Act, and be examined by said board, or by two or more members thereof, in practical mechanics, and concerning his knowledge of operating a locomotive engine and his competency as an engineer.

"SECT. 3. *Be it further enacted*, That upon the examination of any engineer as provided in this Act, if the applicant is found competent, he shall, upon payment of five dollars, receive a license, which shall be signed by each member of the board, and which shall set forth the fact that the said engineer has been duly examined as required by law, and is authorized to engage as an engineer on any of the railroads in this State.

"SECT. 4. *Be it further enacted*, That in addition to the examination provided for in section two (2), it shall be the duty of said board of examiners, before issuing the license provided for in this Act, to inquire into the character and habits of all engineers applying for license; and in no case shall a license be issued if the applicant is found to be of reckless or intemperate habits.

"SECT. 5. *Be it further enacted*, That any engineer who, after procuring a license as provided in this Act, shall at any time be guilty of any act of recklessness, carelessness, or negligence while running an engine by which any damage to persons or property is done, or who shall within six hours before, or during the time he is engaged in running an engine, be in a state of intoxication, shall forfeit his license, with all the rights and privileges acquired by it, indefinitely or for a stated period, as the board may determine after notifying such engineer to appear before the board, and inquiring into his act or conduct. It shall be the duty of the board to determine whether the engineer is unfit or incompetent by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it; and if it is made to appear that he is unfit or incompetent from any cause, the board shall revoke or cancel his license, and shall notify every railroad in this State of the action of the board.

"SECT. 6. *Be it further enacted*, That it shall be the duty of the governor, as soon after the approval of this Act as practicable, to appoint and commission five skilled mechanics, one of whom shall reside in Birmingham, one in Montgomery, one in Mobile, one in Selma, and one in Eufaula, who shall constitute a board of examiners for locomotive engineers. It shall be the

duty of said board to examine locomotive engineers, issue licenses, hear causes of complaint, revoke or cancel licenses, and perform such duties as are provided in this Act: *Provided*, That any one of said board shall have authority to examine applicants for licenses, and if the applicant is found competent, to issue license to him: *Provided further*, That for every examination provided in this Act, the board or member thereof making the examination shall be entitled to five dollars, to be paid by the applicant.

"SECT. 7. *Be it further enacted*, That all engineers now employed in running or operating engines upon railroads in this State shall have three months after the appointment of the board herein provided within which to be examined and to obtain a license.

"SECT. 8. *Be it further enacted*, That any engineer violating the provisions of this Act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not more than six months."

E. L. Russell and B. B. Boone for plaintiff in error.

T. N. McClellan, Attorney-General of the State of Alabama, for defendant in error.

MATTHEWS, J. — The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers, which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by State laws, operating as regulations of commerce, as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject, as the basis of legislation, altogether from the States.

Paramount
right of Con-
gress to regu-
late interstate
commerce.

There are many cases, however, where the acknowledged

powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some general lines of discrimination, however, have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. "But upon an examination of the cases in which they were rendered," as was said in *Sherlock v. Alling*, 93 U. S. 99, 102, "it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on." In that case, it was held that a statute of Indiana, giving a right of action to the personal representatives of the deceased where his death was caused by the wrongful act or omission of another, was applicable to the case of a loss of life occasioned by a collision between steamboats, navigating the Ohio River, engaged in interstate commerce, and did not amount to a regulation of commerce in violation of the Constitution of the United States. On this point the court said (p. 103), "General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the

State may exert power so as to affect interstate commerce without regulating it. Examples.

regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." In that case it was admitted, in the opinion of the court, that Congress might legislate, under the power to regulate commerce, touching the liability of parties for marine torts resulting in the death of the persons injured, but that, in the absence of such legislation by Congress, the statute of the State, giving such right of action, constituted no encroachment upon the commercial power of Congress, although, as was also said (p. 103), "it is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on."

The statute of Indiana held to be valid in that case was an addition to and an amendment of the general body of the law previously existing and in force regulating the relative rights and duties of persons within the jurisdiction of the State, and operating upon them, even when engaged in the business of interstate commerce. This general system of law, subject to be modified by State legislation, whether consisting in that customary law which prevails as the common law of the land in each State, or as a code of positive provisions expressly enacted, is nevertheless the law of the State in which it is administered, and derives all its force and effect from the actual or presumed exercise of its legislative power. It does not emanate from the authority of the National Government, nor flow from the exercise of any legislative powers conferred upon Congress by the Constitution of the United States, nor can it be implied as existing by force of any other legislative authority than that of the several States in which it is enforced. It has never been doubted but that this entire body and system of law, regulating in general the relative rights and duties of persons within the territorial jurisdiction of the State, without regard to their pursuits, is subject to change at the will of the

Legislature of each State, except as that will may be restrained by the Constitution of the United States. It is to this law that persons within the scope of its operation look for the definition of their rights and for the redress of wrongs committed upon them. It is the source of all those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication.

It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of non-feasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defence that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in *Sherlock v. Alling*, above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers, conveyed by common carriers in their vehicles of transportation, a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employees of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as addi-

tional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?

It is that law which defines who are or may be common carriers, and prescribes the means they shall adopt for the safety of that which is committed to their charge, and the rules according to which, under varying conditions, their conduct shall be measured and judged; which declares that the common carrier owes the duty of care, and what shall constitute that negligence for which he shall be responsible.

But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which until displaced covers the subject.

There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case

No national
common law.
Different in-
terpretations
by State and
federal courts.

of Railroad Co. v. Lockwood, 17 Wall. 357, where the common law prevailing in the State of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied was none the less the law of that State.

In cases, also, arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the State courts than in other cases. Swift v. Tyson, 16 Pet. 1; Carpenter v. Providence Washington Insurance Co., 16 Pet. 495; Oates v. National Bank, 100 U. S. 239; Railroad Company v. National Bank, 102 U. S. 14.

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. Moore v. United States, 91 U. S. 270.

The statute of Alabama the validity of which is drawn in question in this case, does not fall within this exception. It would, indeed, be competent for Congress to legislate upon its subject-matter, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam-vessels engaged in the coasting-trade and navigating the inland waters of the United States while engaged in commerce among the States, — Rev. Stat. tit. 52, sects. 4399–4500, — and such legislation undoubtedly is justified on the ground that it is incident to the power to regulate interstate commerce.

In Sinnot v. Davenport, 22 How. 227, this court adjudged a law of the State of Alabama to be unconstitutional, so far as it applied to vessels engaged in interstate commerce, which prohibited any steamboat from navigating any of the waters of the State without complying with certain prescribed conditions, inconsistent with the Act of Congress of Feb. 17, 1793, in reference to the enrolment and licensing of vessels engaged in the coasting trade. In that case it was said (p. 243), "The whole

The Alabama
statute consid-
ered.

commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way, and this without regard to the source of power whence the State Legislature derived its enactment."

The power might with equal authority be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject made by local authority.

But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States.

No objection to the statute, as an impediment to the free transaction of commerce among the States, can be found in any of its special provisions. It requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed, nor prescribe any arbitrary conditions to the grant. The fee of five dollars to be paid by an applicant for his examination is not a provision for raising revenue, but is no more than an equivalent for the service rendered, and cannot be considered in the light of a tax or burden upon transportation. The applicant is required before obtaining his license to satisfy a board of examiners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer; and the board before issuing the license is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate.

Certainly it is the duty of every carrier, whether engaged in the domestic commerce of the State or in interstate commerce,

to provide and furnish itself with locomotive engineers of this precise description, competent and well qualified, skilled and sober; and if, by reason of carelessness in the selection of an engineer not so qualified, injury or loss is caused, the carrier, no matter in what business engaged, is responsible according to the local law admitted to govern in such cases, in the absence of congressional legislation.

The statute in question further provides, that any engineer licensed under the Act shall forfeit his license if at any time found guilty by the board of examiners of an act of recklessness, carelessness, or negligence while running an engine, by which damage to person or property is done, or who shall, immediately preceding or during the time he is engaged in running an engine, be in a state of intoxication; and the board are authorized to revoke and cancel the license whenever they shall be satisfied of the unfitness or incompetency of the engineer by reason of any act or habit unknown at the time of his examination, or acquired or formed subsequent to it. The eighth section of the Act declares that any engineer violating its provisions shall be guilty of a misdemeanor, and upon conviction inflicts upon him the punishment of a fine not less than \$50 nor more than \$500, and also that he may be sentenced to hard labor for the county for not more than six months.

If a locomotive engineer, running an engine, as was the petitioner in this case, in the business of transporting passengers and goods between Alabama and other States, should while in that State, by mere negligence and recklessness in operating his engine, cause the death of one or more passengers carried, he might certainly be held to answer to the criminal laws of the State if they declare the offence in such a case to be manslaughter. The power to punish for the offence after it is committed certainly includes the power to provide penalties directed, as are those in the statute in question, against those acts of omission which, if performed, would prevent the commission of the larger offence.

It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and

property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.

In conclusion, we find, therefore, first, that the statute of Alabama the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

For these reasons, we hold this statute, so far as it is alleged to contravene the Constitution of the United States, to be a valid law.

The judgment of the Supreme Court of Alabama is therefore affirmed.

Mr. Justice Bradley dissented.

See McDonald *v.* State, and note, *supra*, p. 420.

MORGAN'S LOUISIANA & TEXAS R. & S. Co.

v.

BOARD OF REVIEWERS OF THE PARISH OF IBERIA.

(Louisiana Supreme Court, Nov. 21, 1887.)

Taxation. — Cash Value as Basis of. — The actual cash value of property is the constitutional basis of its taxation.

Same. — What is Cash Value. — The actual cash value of real or personal property is the price it would sell for cash, in the ordinary course of business, free from all incumbrances, otherwise than at a forced sale.

Same. — Criterion of Value in assessing Railroads. — Neither the price of investment in, nor the net revenues or profit earned by, a railroad, is the fixed criterion of value in assessment matters.

Same. — Market Value of Stock as Criterion. — Insolvency. — The market value of the stocks or bonds is one of the truest *criteria* of the value of the road ; yet it does not hold when the corporation becomes insolvent.

Same. — Duty of Assessors in fixing Value. — Reviewers. — There exists no rigid rule for the valuation of property which is affected by a multitude of circumstances which no rule can provide for. The assessor must consider all these circumstances and elements of value, and must exercise a prudent discretion in reaching a conclusion. This maxim applies with equal force to the board of reviewers.

APPEAL from District Court, parish of Iberia; James E. Mouton, Judge.

Suit by Morgan's Louisiana & Texas Railroad & Steamship Company against the Board of Reviewers of the parish of Iberia, contesting assessment. Judgment in favor of plaintiffs, and defendant appeals.

Robert S. Perry for appellant.

D. Caffrey for appellee.

WATKINS, J. — The plaintiff company contests the correctness of the valuation of \$10,000 per mile, placed by the defendant board on its property, embracing road-bed, rails, cross-ties, and switches, and consisting of sixteen miles of main track and nine miles of branch track, extending from the main track to the Avery Salt Works. It also contests as a double and excessive valuation that made on the portion of the main track and siding, which traverses the corporate limits of the cities of New Iberia and Jeannerette, contending that these segments are embraced in the valuation of the main track. The total valuation fixed by the defendant board is \$253,400.

while that fixed in the decree of the judge *a quo* is \$152,720. Counsel for the board says, in his brief, "The judgment constitutes this amount the basis of assessment, subject to the two-thirds rule adopted by the board. The application of that rule makes the *judgment valuation* \$101,813.33½. From this the board has appealed." The contention of the appellant is, that its valuation is correct; while that of the appellee is, that the valuation should be reduced to the sum of \$95,293.75, as prayed for in its answer to the defendant's appeal. The appellant further contends that it was necessary that a separate valuation and assessment should be made of that part of plaintiff's property that is situated within the corporate limits of New Iberia and Jeannerette, in order that there might be fixed a basis for city taxation thereon; and this one mile of main track and siding, and other property therein, were not included in the valuation of the main track of sixteen miles in length. In this view the judge *a quo* seems to have concurred, except with regard to the road-bed. The following is the valuation made by the board:—

PROPERTY IN PARISH OUTSIDE THE INCORPORATED TOWNS.

16 Miles of Main Track, at \$10,000	.	.	.	.	.	\$160,000
9 Miles Salt Mine, at \$6,000.	.	.	.	.	.	54,000
1 Station-House at Olivier	.	.	.	.	.	50
1 Section-House in Seventh Ward	.	.	.	.	.	500
1 Section-House and Depot, Fifth Ward	.	.	.	.	.	750
Total	.	.	.	.	.	\$215,300

PROPERTY WITHIN INCORPORATED TOWNS.

New Iberia.

1 Mile Main Track	.	.	.	.	.	\$10,000
1 Mile Side Track, and Switches	.	.	.	.	.	6,000
1 Lot and Depot	.	.	.	.	.	2,500
1 Lot, bounded North by Saintes, South by Railroad, East by Railroad, West by Main Street	.	.	.	.	.	500
1 Lot, bounded North by Railroad, South by Weeks, East by Fulton Street, West by Main Street	.	.	.	.	.	300
1 Boiler and Pump on Bayou	.	.	.	.	.	300
						\$19,600

Jeannerette.

1 Mile Main Track	.	.	.	.	.	\$10,000
1 Mile Side Track, and Switches	.	.	.	.	.	6,000
1 Lot and Depot	.	.	.	.	.	2,000
1 Section-House	.	.	.	.	.	500
						\$18,500

Making the aggregate \$253,400.

To which the judgment of the court reduced it as follows :—

16 Miles of Main Line, at \$6,170	\$98,720
9 Miles of Branch Line, at \$4,500	40,500
2½ Miles of Switches, at \$2,000	5,000
Lot and Buildings at New Iberia	2,200
Other Appurtenances	1,000
Lot and Buildings at Jeannerette	2,200
Other Appurtenances	1,000
3 Section-Houses, at \$200	600
Balance other Improvements and Paraphernalia	1,500
Total Valuation	<u>\$152,720</u>

The assessment under consideration was made under and in pursuance of the provisions of Act 107 of 1884, and for the year 1886. The plaintiff company is an incorporated institution established under the laws of this State, and has its domicile here; and the law under which the complained-of assessment was made makes special provision for the assessment of railroad property and the supervision thereof by a board of reviewers. The amount of the tax demanded is \$3,444.80 for the State and parish, exclusive of that due the cities of New Iberia and Jeannerette.

1. The principal controversy in the case is with regard to the mode in which the value of this class of property, for the purposes of assessment, is to be ascertained. The contention of the plaintiff's counsel is, that railroad property, like that of the cotton exchange in this city, is exceptional in character, and that an assessment of it should be predicated on the *price of investment* less its depreciation in value since construction, and not upon the rental value of the property, or its capacity for producing revenue or income, or of making returns upon the investment. The defendant's counsel, on the other hand, argues that a variety of elements enter into the "actual cash value" of such property, such as prime cost of construction; capacity for earning dividends; terminal facilities; market value of shares of stock or bonds; capacity for transportation of freight and passengers; the length and number of its sidings; the character of the country that is traversed; indeed, every thing that is calculated to make it profitable to those operating it, or valuable in the event of sale. The "actual cash value" of property is the constitutional basis of its taxation. State v. Tax Collector, 39 La. Ann. 536, 2 South. Rep. 59. Constitution, art. 203, provides that all "property shall be taxed in proportion to its value, to be ascertained as directed by law, provided the assessment of all property shall never exceed the actual cash value thereof." Section 30 of Act 98 of 1886 provides

Cash value is
basis of
taxation.

that "all real estate and personal property . . . shall be estimated by the assessors . . . at its actual cash value," etc. Paragraph 6 of section 93 of that Act declares that the term "actual cash value," or actual cash valuation, shall be held to mean a *price* that any piece of real estate or personal or movable property would *sell for cash*, in the ordinary course of business, free of all incumbrances, *otherwise* than by forced sale." The assessor has the right to require any property-holder to produce his books for his examination, in order that he may *estimate* the value of the property to be assessed. He may also interrogate, on oath, the property-owner, his agents and employees, in order to "elicit from them the actual cash value of the property." *Id.* sect. 21. In making an assessment of lands and lots, it is made the duty of the assessor to "take into consideration the enhanced value of the same, arising from the buildings and improvements, such as barns, cribs, sugar-mills, rice-mills, gin-houses, cabins, and machinery." *Id.* sect. 16. In *Railroad Co. v. Sheriff*, 38 La. Ann. 760, we had under consideration quite a similar controversy. The assessment of the Vicksburg, Shreveport, & Pacific Railroad, there in contestation, included 20 miles of tract, lands, depots, and other property in the city of Shreveport, and the railroad bridge that spanned Red River, which was included in the road-bed. The total assessment of the main track was \$170,000, or \$8,500 per mile, including the bridge, the construction of which cost \$300,000. The contention of the company there was, that this valuation was far in excess of the true value of its property, which it fixed at \$4,000 per mile. In that case we expressed the opinion that the bridge had increased the value of the whole length of the road within that parish, and that the board of assessors properly considered it as a factor in fixing the general value of the track. We said, "It sometimes happens that a railroad is more valuable in one parish than another, or more valuable in one than in another part of the same parish. A great many circumstances go to produce this inequality of value. It may be better constructed, or more recently repaired, or traverse a more populous and productive country, or terminate in a thriving town, or have better stations or terminal facilities at one point than at another. In fact, a great number of circumstances might be cited as giving a local value to a road greater at one point along the line than at others in the same parish. The taxing authorities in every parish must take these things into consideration in fixing values, for the obvious reason that they are *elements of value*, and their duty under the law is to assess this value in this parish." We are cited to our opinion in *Cotton Exch. v. Board of Assessors*, 37 La. Ann. 423, as confirmatory of plaintiff's theory that the price of investment is the true criterion

of value in assessment proceedings. In that case the standard of value sought to be established was the rental or income of the property assessed, multiplied by 10. The court held that whatever might be said of this standard of value in respect "to the general class of ordinary property . . . which is susceptible of bringing revenue, it could not be applied to exceptional property beyond its purport, which is not designed to yield a rental or income. . . . In such cases the correct rule would seem to be, to assess at the price invested, where the purchase or improvement is of recent date, and it is not shown that the property has since deteriorated in value," etc.

The plaintiff's counsel presses the argument that a railroad is also *exceptional* property, and not built for barter and sale, but that it is simply an investment, and the cost of construction is a fair standard of its value. In our opinion a railroad is *not* exceptional property. It is not localized, or used for the gratification and enjoyment of its proprietors, like the cotton exchange. Railroads are constructed for the express purpose of being operated for a profit. They are frequently disposed of at public and private sales. They are frequently mortgaged to secure bonds that are floated in the money centres of the country. They are usually operated and controlled by corporations and syndicates, and shares of their stock are daily bought and sold in market overt. These sales of stocks and bonds are recognized standards of value for such properties. The evidence in this record shows that Mr. Huntington purchased 50,000 shares of Morgan stock at \$150 per share, par value being \$100 per share, — a total expenditure of \$7,500,000 for the whole. It shows further that the net earnings of the plaintiff company for the year in which the assessment was made are *admitted* to have been \$61,360, and that there is plausibility in the contention of defendant's counsel that they were \$361,360. The character of the property, its uses and profits, as well as the vast sum involved, clearly demonstrate that it is not exceptional, in the sense that the cotton exchange is. It is true that Judge Burroughs announces the rule to be, "that the assessment being the *value* of the land, looking to all the circumstances of its surroundings, or what may be recognized as the *cash market value*, the *income* is not the proper criterion in ascertaining its value." Burroughs, Tax'n, 227, 228. And another learned author says, "A common method of raising revenue has been, to levy annual taxes on the value of all real and personal property of the inhabitants, with limited exceptions, and *irrespective of the income* which . . . may be realized. This seems at first view to be just; and, in the belief that it is just, it has been steadily adhered to, notwithstanding the many and serious difficulties attending it." Cooley, Tax'n, 26. Yet, the revenue of

income of a railroad may be considered as a factor in ascertaining its value, though it cannot be accepted as a *criterion*. It has been held that the value of the bonds and stocks of a railroad corporation are among the truest *criteria* of the value of the road itself. In treating of "the fair cash value" of the tangible property of a railroad corporation that was assessed under a statute of Illinois quite similar to our own, the Supreme Court say, "It may be assumed, for all practical purposes, — and it is perhaps absolutely true, — that every railroad company in Illinois has a bonded indebtedness, secured by one or more mortgages. The parties who deal in such bonds are generally keen, far-sighted men, and most careful in their investments. Hence the value which these securities hold in the market is one of the truest *criteria*, as far as it goes, of the value of the road as a security for the payment of these bonds. . . . It is therefore obvious, that, when you have ascertained the current cash value of the whole of the funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, all its capital stock, and its franchises." State Railroad Tax Cases, 92 U. S. 604. In that case the State board of equalization assessed the tangible property of an insolvent railroad corporation at \$2,500,000, notwithstanding it was at the time paying but little above its running expenses. The court say, "Concede for the present that the capital stock is sunk, and of no value; concede that the funded debt of the company has at present no value, or is unsalable: there yet remains what is valued as worth over \$2,000,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens." Page 606. It thus appears, that, although the values of railroad securities in market is reckoned among the truest *criteria* of the value of the railroad, it does not hold good when the corporation becomes insolvent, and its shares of stock are below par, and unsalable. This illustration shows the variability of the standard of value of this class of property. Neither the cost of construction, nor its capacity for yielding returns upon the amount of investment, is a fixed criterion of valuation. After having carefully re-examined the whole field of inquiry on this important matter, we can but reiterate with approval the language employed in the concurring opinion in Cotton Exch. v. Board of Assessors; viz., "There exists in fact no rigid rule for the valuation of property which is affected by a multitude of circumstances which no rule can foresee or provide for. The assessor must consider all these circumstances and elements of value, and must exercise a prudent discretion in reaching a conclusion." 37 La. Ann. 423.

2. We are therefore of the opinion that the district judge erred in fixing the valuation of the plaintiff's property on the basis of "the cost of construction, including labor and material," and giving no material weight or consideration to the evidence adduced in regard to the net revenues and earnings of the road. We are likewise of the opinion that he was in error in treating the railroad extending from Lafayette to New Orleans as one piece of property, every portion of which is, for the purpose of assessment, *merged into one whole*, no isolated or particular portion of which can be accurately valued. In *Railroad Co. v. Sheriff* we said, "The assessor . . . has nothing to do with the valuation put upon railroads in other parishes, nor can he regulate his valuation by an average of the several valuations of the different parishes, or by an approximation based upon the general value of the road as an entirety." 38 La. Ann. 761. This can be done only by a State board of equalization, which the Legislature has not seen proper to create. *State v. Tax Collector*, 39 La. Ann. 536. Under our peculiar system, that portion or segment of a railroad situated within a particular parish is *quoad* its assessment, segregated from the trunk, and valued as a whole. The exact provision of our revenue law on the subject is "that the real estate, roadbeds, roads, iron, tracks, superstructures, excavations, and channels of railroads, canals, etc., . . . shall be assessed and taxed *in the parish where located*; and all other property . . . belonging to said railroad shall be assessed and taxed at the domicile or principal office of said railroad. Sect. 30, Act 98 of 1886; Act of 1884. Hence the incorrectness of the rule adopted by the judge *a quo*.

3. A vast amount of testimony was adduced in the court below in favor of the respective contentions of the parties.

Assessment of board of reviewers maintained. Evidence. The plaintiff's counsel seems to have taken especial pains to show the want of evidence before the defendant board, to justify the conclusion they came to, and to overthrow the presumption of correctness that the law raises in behalf of their decision; and with partial success. While it may be true that they did not look into the *minutiae* as critically, as a court of justice would, and did not possess themselves of all the information that was furnished the district judge, their decision is entitled to full weight and due consideration. The plaintiff's calculation, based on the cost of construction, gives as the value of the main track, per mile, \$6,150, less 25 per centum for deterioration, — net, \$4,862.50 per mile; and \$4,125 per mile for short line, less 25 per cent, — net \$3,095.75 per mile. The defendant's calculation, predicated upon net revenues tested by the cost of construction, is placed

at \$7,337.75 per mile. This his counsel arrives at by taking into consideration the value of some sidings and sawmill branches he claims to have been omitted from Mr. Kruttschnitt's calculation. On the theory that the purchase of Morgan stock evidences an *appreciation* of 50 per cent, he places the value of the road per mile at \$11,006.62. Putting it upon the basis of Mr. Kruttschnitt's estimation, and adding 50 per centum thereto, it is worth \$8,264 per mile. He argues that the evidence shows that the road has been kept in full and complete repair, is in good running order, and is fully equipped, and making money. Of this there can be no reasonable doubt. The statement is made by Mr. Hutchinson, in his evidence, that there was expended in 1886 the sum of \$46,693 in betterments, and that the sum of \$258,418 was withdrawn from the earnings of the road, and applied to the discharge of interest on a debt due by the Houston & Texas Central Railroad. Discarding these different theories, and adopting one consonant with the evidence and the legal principles herein announced, we are of the opinion that \$6,500 per mile for 16 miles of main track, outside of the cities of New Iberia and Jeannerette, is a just estimate of the *actual cash value* of the road; and that \$5,000 per mile for the 9 miles of branch line to the Avery Salt Works is likewise a just estimate of its cash value. There is perhaps not this difference in the *cost of construction* of the two; yet taking into consideration, as we have, all the elements of value, there is this difference between them. The one mile of main track within the city of New Iberia and the one mile within the city of Jeannerette are likewise fixed at \$6,500 each. While, possibly, there may be some inaccuracies in the assessment in *other* respects, and some others in the judgment appealed from, we prefer to maintain that of the board of reviewers, as herein modified, for the reason that it was not shown by the evidence to have been otherwise erroneous, and this burden was on the plaintiff.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the assessment of the 16 miles of main track outside of the cities of New Iberia and Jeannerette be and is hereby fixed at \$6,500 per mile; that that of the 9 miles of branch track be fixed at \$5,000 per mile; and that that of the one mile of main track within each of the cities of New Iberia and Jeannerette be fixed at \$6,500. It is further ordered, adjudged, and decreed, that, in all other respects, the assessment as revised by the defendant board be and is hereby maintained; and that the cost of appeal be taxed against the plaintiff and appellee.

Rehearing refused.

Scope of Taxing Power.—Railroads.—That the franchise, capital stock, business, and profits of all corporations are liable to taxation, in the place where they do business, and by the State which creates them, admits of no dispute at this day. "Nothing can be more certain in legal decisions than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of a State government." *State Railroad Tax Cases*, 92 U. S. 575; *Society for Savings v. Coite*, 6 Wall. 607; *State Freight Tax Case*, 15 Wall. 232; *State Tax on Gross Receipts*, 15 Wall. 284.

Owing to the nature and character of railroad property, perhaps no other species of property has been subject to such varied systems of taxation. This variety of methods has produced a mass of inharmonious adjudications from which no well-defined rules can be extracted. Mr. Justice Bradley, in *Leloup v. Port of Mobile*, 127 U. S. 640; s. c., 21 Am. & Eng. Corp. Cas., says,—

"That no revenue for State or municipal purposes can be derived from the agencies or instrumentalities of commerce, no one will contend. The question generally mooted is, *how* shall the end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the power from its abuse is very difficult to trace. No possible good could come from any attempt to collate, explain, or harmonize them."

"It has been a *desideratum*," says the court in *State Railroad Tax Cases*, 92 U. S. 575, "perhaps not yet fully attained, to find a method of taxing this species of property which will be at the same time just to the owners of it, equal and fair in its relations to taxes on other property, and which will enforce the just contribution that such property should pay for the benefits, which, more than property generally, it receives at the hands of the government."

As a general rule, it may be asserted that the taxing power over corporations, including carrying companies, exists to the same extent as when applied to natural persons. It may be laid upon a valuation, or may be an excise tax, either upon the value of the franchises, or a fixed sum, or a graduated contribution proportioned to the value of the privilege granted, or to the extent of their exercise, or to the results of such exercise. *State Tax on Gross Receipts*, 82 U. S. 284. The methods of taxation, therefore, being almost as numerous as there are States, and taxation and its methods being questions of legislative concern, discretion, if not indeed caprice, there can be expected to be found but little harmony in the adjudicated cases, and but few well-defined rules to be drawn therefrom.

The restraining power of courts over the subject of taxation, the valuation and assessment of property, and methods of collection, is limited, because in matters of this character a large legislative discretion must be left with the legislative department of the government. *State Railroad Tax Cases*, 92 U. S. 575; *Nashville, etc., R. R. Co. v. Louisville, etc., R. R. Co.*, 12 Lea, 521; s. c., 17 Am. & Eng. R. R. Cas. 445; *Heine v. Levee Comrs.*, 19 Wall. 660; *Delaware Railroad Tax*, 18 Wall. 206; *Bank of New York City*, 2 Black, 620; *The Bank Tax Case*, 2 Wall. 200; *Society for Savings v. Coite*, 92 U. S. 575; *Provident Bank v. Massachusetts*, 73 U. S. 611; *Porter v. R. I. R. R. Co.*, 76 Ill. 561. Courts are loath to interfere in matters that clearly pertain to coordinate departments of government, and it is only in cases where there is clearly an abuse of this legislative prerogative, either in the enactment or the enforcement of the law, that the aid of the courts is given. Besides, all questions of valuation and equitable modes of assessment rest so largely in the judgment, and the exercise of that judgment having been lodged in officers appointed for the express purpose, courts hesitate in substituting their judgment for that of the legally constituted tribunals, and especially so where the meetings of the latter are fixed by law, and before whom all persons interested can be heard touching causes of complaint.

Valuation as a Basis of Taxation. — Franchises. — Unless exempted in terms which amount to a contract, the franchises of a private corporation are as much a legitimate subject of taxation as any other property of the citizens. *Society for Savings v. Coite*, 73 U. S. 594. They are legal estates, and are not mere naked powers granted to the corporation; they are powers coupled with an interest, and as such, together with all trades and avocations by which citizens acquire a livelihood, are taxable. *Ib.*; *Osborne v. Bank, etc.*, 9 Wheaton, 859.

Where the Legislature fixes and determines the amount of a tax to be raised and the property to be assessed, and upon which it is to be apportioned, its action cannot be reviewed upon the ground that it acted unjustly, or without appropriate and adequate reason. *Spencer v. Merchant*, 100 N. Y. 585; *Ibid.* 8 S. C. R. 921; *Litchfield v. Vernon*, 41 N. Y. 123; *People v. Brooklyn*, 4 N. Y. 427; *People v. Flagg*, 46 N. Y. 405; *Harn v. Newlots*, 83 N. Y. 100; *Cooley on Taxation*, 450. But where the valuation is not fixed by the Legislature, but is left to officers designated for that purpose, and the assessment is based upon (1) the real estate in each county not a part of the track and right of way, and of the personal property remaining permanently in each locality to be assessed by the county, city, or town authorities; (2) the railroad track, including the right of way, grading, superstructure, and such depots, buildings, and other improvements as are on it, and all rolling stock, and other personal property not local to be reported to the State board of equalization, who fix the value, and apportion it to each county, city, and town, according to the length of track which each bears to the entire length of the road assessed by the board; and (3), the value of the franchises and capital stock to be fixed in such manner as shall be determined by the board, — it was held that the market or fair cash value of the capital stock and franchises should be determined as follows: By adding together the fair cash value of shares and the fair cash value of the debt (excluding current expenses), and from such aggregate deducting the equalized valuation of the first two lists of items, i. e., the tangible property, and the remainder would be the amount upon which to make the assessment. Of this system of valuation, the Supreme Court, in *State Railroad Tax Cases*, 92 U. S. 575, say, "We confess we have, on the whole, seen no scheme which is better adapted to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property, and of making the tax just and equal in its relations to other taxable property of the State." But under this mode of valuation, if the board of equalization should include as an element in its valuation part of the property which the local assessors are required to value, the tax would be rendered void. *Santa Clara County v. Southern Pac. R. R. Co.*, 118 U. S. 394; s. c., 24 Am. & Eng. R. R. Cas. 523. Especially so where the void assessment cannot be separated from that which is legal, and thereby enable the company to pay the latter. *Ibid.*; *Libby v. Barnham*, 15 Mass. 144; *State, etc., v. City, etc.*, 38 N. J. L. 93; *Wells v. Bunbank*, 17 N. H. 393; *Mosier v. Robie*, 11 Me. 137; *Stone v. Bean*, 15 Gray (Mass.), 42; *Johnson v. Colburn*, 36 Vt. 695; *Gamble v. Witty*, 55 Miss. 26.

A tax upon the franchise may also be properly and legally determined by ascertaining what proportion the number of miles of its lines in the State bear to the whole number of miles operated by the company, and taxing an equal portion of the assessable value. *Telegraph Co. v. Massachusetts*, 125 U. S. 530; s. c., 21 Am. & Eng. Corp. Cas.

And in such case no reduction need be made for the value of other property subject to local taxation in other States. *Ib.* In North Carolina the franchise must be assessed separately from the other property. *Richmond v. Brogden*, 74 N. Car. 707.

Capital Stock. — Taxation of the capital stock is a tax on the corporation, and is legal. *Delaware R. Co. Tax*, 18 Wall. (U. S.) 206. The capital stock and

bonds of an interstate railway are liable to State taxation in the proportion that the length of road in the State bears to the entire length of road. *Pittsburg, etc., R. Co. v. Commissioners*, 65 Pa. St. 73. When the law requires the appraisement of stock to be made between the 1st and 15th of November, at its cash value, "not less, however, than the average price for which it sold during the year," it means that the valuation shall be the November selling-price unless the average selling-price during the year shall exceed that sum, in which case the latter shall govern. *Pennsylvania R. Co. v. Commonwealth*, 94 Pa. St. 474. The stock should be assessed at its actual, and not par, value. *People v. Commissioners*, 64 How. (N. Y.) Pr. 405. However, an assessment at the par value will be valid if the evidence shows the market value to be higher than the par value. *St. Charles R. Co. v. Board of Assessors*, 31 La. An. 852. A law making the market value the basis of assessment is constitutional. *Ibid.*; *New Orleans, etc., R. Co. v. Board of Assessors*, 32 La. An. 19. Where a railroad company is organized in a State, its capital stock is taxable in that State, though the owners are non-residents. *Faxton v. McCosh*, 12 Ia. 527. But shares belonging to a resident must be listed by him, and not by the corporation; and he is allowed to deduct from the tax on his shares a ratable part of the tax paid by the corporation. *Raleigh, etc., R. Co. v. Commissioners*, 87 N. Car. 414. In estimating the value of the capital stock, the assessed value of the real estate should be deducted. *People v. Commissioners*, 46 How. (N. Y.) Pr. 227.

Gross Receipts. — The tax may also be assessed on the gross earnings, or gross receipts; but in such case the amount received from another company for the right to run its trains over the road is not to be included. *State v. St. Paul, etc., R. Co.*, 30 Minn. 311; s. c., 13 Am. & Eng. R. R. Cas. 663. Such a tax is not a violation of the Constitution of the United States relating to interstate commerce, or imports and exports, — *State Tax on Gross Receipts*, 82 U. S. 284; *Philadelphia, etc., R. Co. v. Commonwealth*, 4 Brew. (C. C.) 222; *Buffalo, etc., R. R. Co. v. Commonwealth*, 3 Brew. (C. C.) 386; *Kneeland v. City, etc.*, 15 Wis. 454, — though a tax on the freight would be. *State Tax on Gross Receipts*, 15 Wall. (C. C.) 284. A tax on gross receipts simply fixes a basis for assessment or valuation, and is in reality a tax on the franchise, and therefore constitutional. *Society for Savings v. Coite*, 73 U. S. 594; *Provident Inst. v. Massachusetts*, 73 U. S. 611; *State Tax on Gross Receipts*, 82 U. S. 284. Where a statute requires all railroads to pay an annual license fee of four per cent on the gross earnings where the earnings equal or exceed a given amount per mile per annum, and in addition thereto two per cent on gross earnings for the purposes of valuation, it is held that the statute means the gross earnings of the main line and all branches as an aggregate, and not the gross earnings of each by itself, separately estimated. *State v. McFelridge, etc.*, 56 Wis. 256. Where the tax is based upon the receipts, and such receipts are derived partly from interstate commerce and partly from internal commerce for the purposes of assessment, only receipts that are clearly derived from internal commerce are to be considered, — *Ratherman v. Western Union Tel. Co.*, 127 U. S. 411; s. c., 21 Am. & Eng. Corp. Cas.; *State Freight Tax*, 15 Wall. 232; *Telegraph Co. v. Texas*, 105 U. S. 460, — because no State has a right to lay a tax on interstate commerce in any form, whether it be upon gross receipts or otherwise. *Leloup v. Port of Mobile*, 8 S. C. R. 1380. This later case overrules *Osborne v. Mobile*, 83 U. S. 479, if, indeed, it does not in effect overrule *State Tax on Gross Receipts*, 82 U. S. 284.

Rolling Stock. — The rolling stock is personal property, and should be assessed where the company has its legal residence, — *Pac. R. Co. v. Cass Co.*, 53 Mo. 17, — or where it has its principal place of business. *Portland, etc., R. Co. v. Saco*, 60 Me. 196. But for the purposes of taxation it is competent for the Legislature to provide that this class of property shall be distributed through the counties, cities, and towns where the road runs for valuation and assess-

ment, in proportion to the length of road in those localities. *State v. Severance*, 55 Mo. 378. A general tax on rolling stock used in the transportation of interstate commerce is unconstitutional. *Minot v. Philad., etc., R. Co.*, 7 Phila. (Pa.) 555. In the valuation of a railroad based upon its rolling stock, if the road extends to two or more States, the valuation should be distributed in the proportion that the line in each State bears to the entire line. *State Treasurer v. Auditor*, 46 Mich. 224; *State v. Housatonic R. Co.*, 48 Conn. 44.

Dividends. — The tax may also be placed upon the dividends exceeding a certain per cent declared by a corporation during the year, in which case it means the aggregate dividends during such period. *City of Philadelphia v. Ridge Ave. R. Co.*, 102 Pa. St. 190; s. c., 13 Am. & Eng. R. R. Cas. 341. It is not necessary that the dividends be actually declared: it is sufficient if they shall have been passed to the shareholders: and this may be in money or its equivalent, such as new shares. *Commonwealth v. Pittsburg*, 74 Pa. St. 83. But it must be understood that a mere change in form of the capital stocks by which the shares are increased, but the profits not increased, is not a dividend subject to assessment. *Ibid.* Neither is it a dividend where the corporation sells its own stock to its own stockholders at a fixed price per share to be paid in cash, unless it is a mere pretence to cover up the dividends. *Commonwealth v. Erie, etc., R. Co.*, 74 Pa. St. 94.

Real Estate. — The real estate of a railroad company other than its roadway, together with its personal property having a *situs*, may be valued and assessed like other similar property of the local taxing district where situated. *Franklin Co. v. Nashville R. R. Co.*, 12 Lea, 521; s. c., 17 Am. & Eng. R. R. Cas. 445; *Toledo, etc., R. Co. v. City of Lafayette*, 22 Ind. 262. It cannot be assessed as "non-resident" lands. *People v. Fredericks*, 48 Barb. 173; *Buffalo v. Supervisors*, 48 N. Y. 93. The Legislature may treat the rolling stock as real estate. *Louisville, etc., R. Co. v. State*, 25 Ind. 177.

Under the laws of New York, which provide for taxing the assessed value of the real estate, and where the corporation is assessed on its capital stock, if its real estate is situated out of the State, its actual value, as ascertained by competent evidence, should be deducted, and the price paid for such real estate in the absence of other evidence may be adopted as such value. *People v. Comrs. of Taxes*, 104 N. Y. 240.

Personal Property. — Where railroad property is taxed as other property of the State, its personal property should be assessed at its place of business. *Portland, etc., R. R. Co. v. Saco*, 60 Me. 196; *Pacific, etc., R. Co. v. Cass Co.*, 53 Mo. 17; *Orange, etc., R. Co. v. Alexandria*, 17 Grat. (Va.) 176. Bonds, notes, and other mere evidences of debt, are valued and assessed by the ordinary rates of taxation, — *Wright v. South-western R. Co.*, 64 Ga. 783, — unless they form a part of the income of the road. Lumber and material distributed along the line of road for present use in operating and repairing the road are a part of the road, and are taxable. *Fitchburg, etc., R. Co. v. Prescott*, 47 N. H. 62.

For the purposes of assessment and valuation, the choses in action, rolling stock, and personal property of a railroad company, according to the principles of the common law, have their *situs* at the domicile or place of business of the company. *Mayor, etc., v. Alexander*, 10 Lea, 475; *Mayor v. Thomas*, 5 Cold. (Tenn.) 607. But the Legislature may change the *situs* of such property for the purposes of taxation. *McLaughlin v. Chadwell*, 7 Heisk. (Tenn.) 389; *Bedford v. Nashville, etc.*, 7 Heisk. (Tenn.) 40; *State Railroad Tax Cases*, 92 U. S. 575.

Must be Uniform. — Taxation must be uniform, and such uniformity relates both to the tax and the valuation. A tax upon the gross receipts of some companies, and upon the capital stock of others, is clearly illegal. *Worth v. Wilmington, etc., R. R. Co.*, 13 Am. & Eng. R. R. Cas. 286; *Gatlin v. Tarboro*, 78 N. Car. 119. The true rule as to uniformity is, that the tax must be uniform

as to all persons or corporations engaged in the same business. **Railroad Tax Case**, 92 U. S. 575. In the assessment of railroad property in a county, the same per cent must be adopted that is applied to other property. **Bureau Co. v. Chicago, B. & Q. R. Co.**, 44 Ill. 229; **Chicago & N. W. R. Co. v. Supervisors**, 44 Ill. 240; **Chicago, etc., R. Co. v. Livingston Co.**, 68 Ill. 458. In Indiana the Constitution does not require a uniform method of valuation; and in this matter the Legislature is vested with a discretion, and unless the method adopted is clearly inadequate to secure the result, courts will not interfere. **Louisville, etc., R. Co. v. State**, 25 Ind. 177. Even where the taxes are required to be uniform, the fact that some roads, by the process of valuation, pay only upon the tangible property, and others are required to pay upon the tangible property and also upon the excess of value of capital stock over the value of tangible property, does not render the tax void for want of uniformity, where no fraudulent intention is shown. **Chicago, B. & Q. R. Co. v. Siders**, 88 Ill. 320. The failure of the proper officers to assess one road does not render the tax void as to other roads properly assessed. *Ibid.* A deduction made in the assessment of railroad property for incumbrances, where they are not made on other property, renders the assessment void. **Santa Clara Co. v. Southern Pac. R. Co.**, 13 Am. & Eng. R. R. Cas. 182. The valuation placed upon railroad property by the corporation authorities, where they are required to report such value, is not conclusive on the State board. **Chicago, B. & Q. R. Co. v. Paddock**, 75 Ill. 616; **Chicago, etc., R. Co. v. Raymond**, 97 Ill. 213. The board must act on their own judgment and knowledge. **St. Louis, etc., R. R. Co. v. Surrell**, 88 Ill. 537; **Porter v. Rockford, etc., R. R. Co.**, 76 Ill. 564. The evidence which a board may hear in order to determine the value of a road for taxation need not be confined to that which would be competent before a court. **State v. St. Louis, etc., R. Co.**, 8 Mo. App. 583. In estimating the value of railroad property, the inquiry should be directed to what it is worth for the purposes for which it is designed, and not for other purposes to which it might be applied, — **State v. Illinois, etc., R. R. Co.**, 27 Ill. 64, — nor should its land be assessed as mere farming land, — **People v. Fredericks**, 48 Barb. 174, — and improvements are to be taken into consideration. **Chicago, etc., R. Co. v. Lee County**, 44 Ill. 248. In the absence of methods of valuation prescribed, any mode of ascertaining the value of the property which tends to reach the result required, such as personal inspection, inquiry of persons familiar with such values, testimony of witnesses, income received from the property, capacity of yielding profits, its situation, convenience to markets, nearness or distance from great lines of transportation, and, in a word, all the elements that enter into the value of property of any and all kinds, may be looked to in order to arrive at a just result. **City of Chattanooga v. Nashville, etc., R. Co.**, 7 Lea, 566.

In New Jersey the State board of assessors are required to assess railroad property at its true value, and they are not necessarily governed by the valuation of the local assessors. **State v. Battle**, 11 Atl. Rep. 17; **C. B. & Q. R. R. Co. v. State Board, etc.**, 7 Atl. Rep. 306. Neither is such board bound by the valuation placed on the property by the officers of the corporation. **Illinois, etc., R. & C. Co. v. Stookey (Ill.)**, 31 Am. & Eng. R. R. Cas. 479. But they may properly refer to the reports of the company required by law to be made, in order to ascertain the earning capacity of the road. **People v. Hicks**, 105 N. Y. 198, affirming 40 Hun, 598.

The cost of acquisition is not an absolute criterion of the value, but is an important element to be considered, under the circumstances upon which the value is to be formed. **Central, etc., R. Co. v. State Board of Assessors (N. J.)**, 7 Atl. Rep. 306; but see **Illinois, etc., R. Co. v. Stookey (Ill.)**, 31 Am. & Eng. R. R. Cas. 479.

Branch roads owned or leased by a company, though constituting but one system, should be assessed and valued separately from the main line; counties

through which such branch roads run are only entitled to the tax on the branches according to their respective values. *Louisville, etc., R. Co. v. Bates*, 12 Lea (Tenn.), 573; s. c., 17 Am. & Eng. R. R. Cas. 494.

JOHN W. SMITH.

STATE OF CALIFORNIA

v.

CENTRAL PACIFIC R. Co. ;

SAME *v.* SOUTHERN PACIFIC R. Co. ;

SAME *v.* NORTHERN PACIFIC R. Co. ;

SAME *v.* CALIFORNIA PACIFIC R. Co.

(127 *United States Reports*, 1.)

Taxation. — Assessment of Connecting Steamers of a Railroad Company by State Board. — By the Constitution of California, two modes of assessment for taxation are prescribed, — one by the State board of equalization, the other by the county board of local assessors. All property is directed to be assessed in the county, city, etc., in which it is situated, except that the franchise, roadway, road-bed, rails, and rolling stock of any railroad operated in more than one county are to be assessed by the State board, and to be apportioned to the several counties, etc. By an Act of the Legislature, the State board is required to include in their assessment steamers engaged in transporting passengers and freight across waters which divide the railroad. This Act was held by the Supreme Court of California to be contrary to the Constitution, and steamboats were held to be assessable by the county board, and not by the State board. This court, following that decision, and that of *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394; s. c., 24 Am. & Eng. R. R. Cas. 523, holds that the assessment of the steamers of a railroad company by the State board is in violation of the Constitution of California, and void; and, being inseparably blended with the other property assessed, makes the whole assessment void.

Assessment by State of Franchises granted by Congress. — The State board of equalization of California, having included in their assessment all the franchises of a railroad company, amongst which were franchises conferred by the United States of constructing a railroad from the Pacific Ocean across the State as well as across the Territories of the United States, and of taking toll thereon, *held*, that the assessment of these franchises was repugnant to the Constitution and laws of the United States, and the power given to Congress to regulate commerce among the several States. Franchises conferred by Congress cannot, without its permission, be taxed by the State.

Authority of Congress to authorize Construction of Railroad. — Congress has authority, in the exercise of its power, to regulate commerce among the several States, to construct, or authorize individual corporations to construct, railroads across the States and Territories of the United States.

ERROR to the Circuit Court of the United States for the Northern District of California.

These cases were argued together. They all involved the constitutionality of tax laws of the State of California, in many respects the same constitutional questions being presented as those which were argued (and not decided) in *Santa Clara County v. Southern Pacific Railroad Company*, 118 U. S. 394; s. c., 24 Am. & Eng. R. R. Cas. 523.

Each action was brought by the people of the State of California to recover a tax assessed upon the property and franchises of the defendant.

The provisions of the Constitution and laws of the State of California authorizing the suits, and which were relied upon to sustain the validity of the taxes, were stated in the brief of the attorney-general.

The answers of the defendants, although varying according to the facts in each case, substantially agreed in setting up, in addition to general denials, that the tax as assessed against each of them was not assessed in the same mode, and with the same exemptions of their mortgaged property, that was allowed to private individuals and other corporations, and that consequently they were denied the equal protection of the laws; and further, that it was assessed without the notice given to individuals, and consequently that their property was taken without due process of law. Some of them set up that they enjoyed franchises conferred by the United States, not taxable without the assent of Congress; and others that property had been included in the valuation in violation of the provisions of the Constitution of California, thereby invalidating the whole assessment.

All the suits were commenced in a court of the State, and were removed on petition of the defendants to the Circuit Court of the United States for what is now the Northern District of California. In each, judgment was rendered for the defendant, to review which the plaintiff below in each case sued out a writ of error.

J. M. Wilson for plaintiffs in error. • *Samuel Shellabarger* with him on the brief. *G. A. Johnson*, Attorney-General of California, filed a brief for same.

George F. Edmunds, *William M. Evarts*, and *Creed Haymond* for defendants in error.

Harvey S. Brown also filed briefs and an argument for defendants in error.

George A. Johnson, Attorney-General of California, closed for plaintiff in error.

BRADLEY, J. — These cases are substantially similar to those of *Santa Clara County v. The Southern Pacific Railroad Company*, and the other cases decided at the same time, and reported in 118 U. S. 394; s. c., 24 Am. & Eng. Facts.

R. R. Cas. 523. It will be unnecessary, therefore, to set out many provisions of the Constitution and laws of the United States and of California which are involved in the present cases in common with those referred to. The actions were brought by the State of California in the Superior Court for the county of San Francisco, and were removed into the Circuit Court of the United States, where a jury was waived in each case, and the causes were tried by the court, whose findings of fact and conclusions of law are contained in the respective records. One of the cases (No. 660 on the docket) was brought against The Central Pacific Railroad Company for the recovery of the State and county taxes due upon the assessment of the company's property made by the State board of equalization for the year 1883; said assessment being \$18,000,000, and the taxes amounting to \$276,865.10, sixty per cent of which was tendered and paid without prejudice to either party after the suit was brought. Another case (No. 1157) is an action against the same company for the taxes of 1884, due upon a like assessment of \$24,000,000. A third (No. 664), against the same company, is for the taxes of 1884, upon an assessment of \$22,000,000. No. 661 is a similar action against the Southern Pacific Railroad Company for the taxes of 1883. No. 662 is a similar action against the Northern Railway Company for the taxes of 1883. No. 663 is a similar action against The California Pacific Railroad Company for the taxes of 1883. Tender and payment of sixty per cent of the taxes were made in all the cases except 1157, in which the amount tendered and paid was fifty per cent. Similar defences were set up in these cases as in the cases reported in 118 U. S. It was claimed, as in those cases, that in making the assessments no deduction was made for the mortgages on the companies' property, whilst such deduction was made on the property of other citizens, by assessing to the mortgagees the amount of the mortgages as an interest in real estate; thus discriminating against the company, and denying to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution. It was also alleged in defence that the board of equalization included in the assessments a valuation of rights, franchises, and property which they had no authority to assess; as, for example, franchises granted to the companies by the United States, and ferry-boats, fences, and other property subject to be assessed by the local county boards, and not by the State board; and that the assessments were for aggregate amounts,

not showing on their face what part of the valuation represented the property illegally included therein, thus rendering the entire assessment in each case void. It was on this latter ground that the judgments for the defendants in the former cases were affirmed. If these defences, or either of them, are supported by the facts, it is unnecessary for us to decide the question raised under the Fourteenth Amendment of the Constitution. The questions arising under that amendment are so numerous and embarrassing, and require such careful scrutiny and consideration, that great caution is required in meeting and disposing of them. By proceeding step by step, and only deciding what it is necessary to decide, light will gradually open upon the whole subject, and lead the way to a satisfactory solution of the problems that belong to it. We prefer not to anticipate these problems when they are not necessarily involved.

The ground on which it is alleged that the assessments in question were made to include property which the State board had no authority to assess, is to be found in art. xiii. sects. 9 and 10 of the State Constitution. Those sections are as follows:—

“SECT. 9. A State board of equalization, consisting of one member from each congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office, after those first elected, shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The controller of State shall be *ex officio* a member of the board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation: *Provided*, such State and county boards of equalization are hereby authorized and empowered under such rules of notice as the county boards may prescribe as to the county assessments, and under such rules of notice as the State board may prescribe as to the action of the State board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll.

“SECT. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and

rolling stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

The last section shows explicitly, that, in regard to a railroad, the State board has power to assess only five things, — the franchise, roadway, road-bed, rails, and rolling stock; the county boards are authorized to assess all the rest of the property. If the State board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be *pro tanto* illegal and void. If the unlawful part can be separated from that which is lawful, the former may be declared void, and the latter may stand; but if the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal. This is so well settled, that it needs no citation of authorities further than to refer to the opinion of this court in the former cases (118 U. S.). In the present assessments all parts of the property are blended together and are inseparable. If it be true, therefore, that property not authorized to be included in the assessments is included therein, the assessments must be declared void.

Things which
State board has
power to assess.

The Legislature of California, in passing laws for carrying out the principles and methods of taxation laid down in the Constitution, has deviated from its words, and has adopted some provisions which would seem to be a departure from it. As the State board of equalization, in making the assessments in question, undertook to follow the law, it will be necessary to examine it. By sect. 3628 of the Political Code as amended in 1880 it was provided as follows:—

Provisions of
Code for carry-
ing out con-
stitutional
methods of
taxation.

"The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority, they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. All other taxable property shall be assessed in the county, city, city and county, town, township, or district in which it is situated. . . . The assessor must, between the first Mondays of March and July

in each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the State board of equalization, and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock of the first Monday next preceding."

By sect. 3665 of the same Code, as amended by the Act of March 9, 1883, it is, amongst other things, provided as follows:—

"The State board of equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the board must assess the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August, the board must apportion the total assessment of the franchise, roadway, road-beds, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties."

Here it will be perceived that the Legislature undertakes to define what things are, and what are not, comprised within the five categories of railroad property assessable by the State board, and declares that they include not only the entire railway within the State, the right of way, bridges, and culvert, but also the "wharves and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road." This is clearly an enlargement of the terms of the Constitution. Steamers, at least, are not, and have been held by the Supreme Court of California not to be, embraced in the five categories.

Now, one of the grounds of defence set up by the Central Pacific Railroad Company in Nos. 660 and 1157, by the Northern Railway Company in No. 662, and by the California Pacific Railroad Company in No. 663, is, that the value of their steam ferry-boats was blended by the State board of equalization with the

**Definition by
Legislature of
things to be
assessed by
State.
Steamers.**

**Defence that
steamers were
blended by
State board
with other
values.**

other values contained in the assessments. The Central Pacific Company, in its answers (and the others contain similar averments), says, —

“The western terminus of the said railroad of defendant is in the city of San Francisco, on the west side of the Bay of San Francisco. The distance across said bay is five miles, and the whole thereof is part of the navigable waters of said bay. The cars of the company are transported from the end of the railroad track of said road on the eastern side of said bay to the end of the railroad track on the western side of said bay on steam ferry-boats belonging to the defendant, built, owned, and constructed for that purpose, and are of great value. For more than four years past the defendant has been the owner of two steam ferry-boats, one of the tonnage of 1,566 tons, and one of the tonnage of 1,012 tons, and during the whole of that time has used said boats for the purposes aforesaid. Said boats now are, and for more than four years last past have been, of a class which are by law required to be registered, and now are, and for more than four years last past have been, duly registered and enrolled in the city and county of San Francisco, State of California.

“The State board of equalization, in making said pretended assessment of the said roadway, road-bed, rails, and rolling stock of defendant, did wilfully and designedly include in the valuation thereof the value of said boats, and the value of said boats is blended in said pretended assessment with the value of said roadway, road-bed, rails, and rolling stock, and there is no means by which such value can be separated from the valuation placed by said board upon said road-way, roadbed, rails, and rolling stock, or either of them.”

This allegation is sustained by the court below in its findings of facts in the cases referred to. The finding in 660, and substantially the same in the other cases, is as follows: —

“That on the eighteenth day of August, 1883, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by sect. 10 of art. xiii. of the Constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad against defendant. Said pretended assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling stock, or any properties of said railroad, but all of said property was blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assess-

ment than the aforesaid was ever made of said property or any part thereof for said fiscal year. Said assessment included all property and kinds of property mentioned in sect. 3665 of the Political Code of California as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed, as provided in said section, by local assessors."

This is a clear affirmation of the allegation of the answer. Sect. 3665 of the Political Code, as amended March 9, 1883, requires the State board of equalization to include in their assessment of railroad property "all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road." It is a matter of public notoriety, as much so as the existence of the railroad itself, or that of the Sierra Nevada, or any other geographical feature on the route, that the railroad companies in the cases referred to have steam ferry-boats engaged in the transportation of passengers and freight across the Bay of San Francisco and the Straits of Carquinez, and that without such means of transportation those waters could not be crossed.

The question whether steamers and ferry-boats should be included in the property assessed by the State board of equalization or in that assessed by the county board, was distinctly raised in the case of *San Francisco v. Central Pacific Railroad Company*, 63 Cal. 467, 469; s. c., 13 Am. & Eng. R. R. Cas. 664, and decided in favor of the county board. That was an action brought by the city and county of San Francisco against the company to recover taxes imposed upon it by virtue of an assessment made by the county board upon the same ferry-boats now assessed by the State board. The company resisted the tax, on the ground that these boats were assessable by the State board, and not by the county board. The Supreme Court of California decided against the company. Its finding of facts was as follows; namely, "That the defendant is a corporation existing under the law of the United States, and of this State, . . . owner of a line of railroad known as the Central Pacific Railroad, extending from a point in the city of San Francisco . . . to Ogden in the Territory of Utah; that the length of said road in the city and county of San Francisco is four miles from a point within said city to the eastern shore of the southern arm of the Bay of San Francisco; that from said point on the eastern shore . . . to a point on the western shore of said bay, where the railway of defendant again commences, is about twelve miles; that across said bay no line of railroad has been constructed, and freight and passengers carried upon said road are taken across said bay

Assessment of
steamers by
State board
held void under
State Constitu-
tion.

upon steam ferry-boats ; . . . that upon the decks of said vessels are laid railroad tracks, etc.” After giving judgment for the plaintiff upon these facts, the court says, “The sole question presented for decision herein is whether the steamers ‘Thoroughfare’ and ‘Transit,’ mentioned in the above findings, are to be assessed by the assessor of the city and county of San Francisco or by the State board of equalization. The property to be assessed by the board is defined in the tenth section of art. ix. (xiii.) of the Constitution of 1879. It is the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State. All other property than the above-mentioned is to be assessed by the local assessors. Are the steamers above named embraced within the category of property named in the section above referred to? The relation of such steamers to the Central Pacific Railroad Company is set forth in the findings.” The court then proceeds to show that the ferry-boats cannot be included in either of the five categories mentioned in the Constitution, namely, in either the franchise, roadway, road-bed, rails, or rolling stock, and concludes as follows : “We are of opinion that the assessment of the steamers above mentioned pertained to the local assessor, and was properly made by the assessor of the city and county of San Francisco.” This decision was made in June, 1883, and is a construction of the Constitution of California. It follows that the Act of March 9, 1883, as reproduced in sect. 3665 of the Political Code, departs from the constitutional provision ; and that the assessments, in following the Act, are also unconstitutional and void.

In No. 1157, one of the cases against the Central Pacific Railroad Company, being for the taxes of the year 1884, the court finds that the State board of equalization, in making the assessment, did knowingly and designedly include in the valuation of the roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. This brings that case precisely within the decision made in the former cases reported in 118th United States Reports.

**Including value
of fences in
valuation.**

Another defence set up by the Central Pacific Railroad Company in the three cases against it, namely, Nos. 660, 664, and 1157, and by the Southern Pacific Railroad Company in No. 661, is, that the State board of equalization included in their assessments in said cases the value of the franchises conferred upon said companies by the United States, which, it is contended, is repugnant to the Constitution and laws of the United States, and therefore void. Thus, in No. 660, the Central Pacific Railroad Company, in its answer, after reciting the various Acts

**Defence that
assessment
included fran-
chise conferred
by United
States.**

of Congress conferring franchises and privileges, and imposing duties upon the company, avers that it is a federal corporation, and holds its corporate powers and franchises under the government of the United States, and that the said government has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of the company. Similar averments are made in the other cases, 664, 1157, and 661. The court finds in each of these cases that the assessment made by the State board of equalization included the full value of all franchises and corporate powers held and exercised by the defendant. The first question, then, is whether the defendants in these cases held any franchises granted to them by the government of the United States. Of this there can hardly be a doubt.

The Central Pacific Railroad Company was constituted by the consolidation of two State corporations of California, but derived many of its franchises and privileges from the government of the United States. The findings of the court below on this subject are as follows; to wit, —

“That on the twenty-eighth day of June, 1861, a corporation was formed and organized, under the laws of the State of California, under the corporate name of the Central Pacific Railroad Company of California. Said corporation was formed for the purpose of constructing, owning, and operating a line of railroad and telegraph, commencing at the city of Sacramento, in said State, and running thence through the counties of Sacramento, Placer, Sierra, and Nevada, to the eastern boundary of said State, in the expectation that its proposed railroad would, when constructed, constitute part of a line of railroad extending from the Missouri River to the Pacific Ocean, which line it was then supposed was about to be constructed under the legislative supervision and authority of the government of the United States, and which line of railroad was afterwards so constructed.

“That on or about the first day of July, 1862, the government of the United States undertook to construct, or to cause to be constructed, a line of railroad from the Missouri River to the Pacific Ocean, and to that end Congress passed an Act entitled ‘An Act to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes.’ 12 Stat. 489, c. 120.

“That to facilitate the construction of said road the government of the United States, by said Act of Congress, conferred upon the said Central Pacific Railroad Company of California the same powers, and clothed it with the same privileges and

immunities, which it conferred upon and clothed with the said Union Pacific Railroad Company, except that the said Central Pacific Railroad Company of California was to commence the construction of said railroad at the Pacific Ocean, and build east until it met the said Union Pacific Railroad building west.

“That on or about the second day of July, 1864, Congress passed an Act entitled ‘An Act to amend an Act entitled An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government of the United States the use for the same for postal, military, and other purposes,’ approved July 1, 1862. 13 Stat. 356, c. 216.

“That said Central Pacific Railroad Company of California filed in the Department of the Interior its acceptance of the terms and conditions of said Act of Congress of July 1, 1862, within the time therein designated.

“That on or about the thirty-first day of October, 1864, said Central Pacific Railroad Company of California sold and assigned all its rights, under the aforesaid Acts, to a corporation then existing under the laws of the State of California, and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San José and Sacramento, in said State of California. Said assignment was ratified and confirmed by the United States by an Act of Congress passed on the third day of March, 1865, entitled, ‘An Act to amend an Act entitled, An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1, 1862, and to amend an Act amendatory thereof, approved July 2, 1864.’ 13 Stat. 504, c. 88.

“That the said line of railroad from the Pacific Ocean to Ogden, in Utah Territory, was completed and put in operation in 1869, and has been in operation from that time until the present, and still is in operation; and the whole of the railroad mentioned in the said Acts of Congress has long since been completed, and is now, in accordance with the spirit and intent of said Acts of Congress, operated as one continuous line from the Missouri River to the Pacific Ocean, and is so operated and maintained for the uses and purposes mentioned in said Acts.

“That in August, 1870, acting under the said Acts of Congress, said Central Pacific Railroad Company of California and the said Western Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company. Said company is the defendant herein, and has, from the completion of said railroad as aforesaid until the present time,

owned (except in the respect hereinafter stated) and operated said railroad under and by virtue of said Acts of Congress, and for the uses and purposes therein mentioned."

If we turn to the Acts of Congress referred to by the court, we shall find that franchises of the most important character were conferred on this company. Originally the Central Pacific Railroad Company of California had only power to construct a railroad from Sacramento to the eastern boundary of the State. Congress, by the Act of 1862, authorized the company (in the words of the Act) "to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned [the Union Pacific], and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California." Sect. 9. In the following section it was enacted, that, after the completion of its road to the eastern boundary of California, the Central Pacific might unite upon equal terms with the Union Pacific Railroad Company in constructing so much of said railroad and telegraph line, and branch railroads and telegraph lines, through the Territories, from the State of California to the Missouri River, as should then remain to be constructed, on the same terms and conditions as provided in relation to the Union Pacific Railroad Company. Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given, by the Acts of 1862 and the subsequent Acts, to construct a railroad from the Pacific Ocean, across the State of California and the Federal Territories, until it should meet the Union Pacific, which it did meet at Ogden in the Territory of Utah. This important grant, though in part collateral to, was independent of, that made to the company by the State of California, and has ever since been possessed and enjoyed. The present company has it by transfer from, and consolidation of, the original companies, by which its existence and capacities were constituted. Such consolidation was authorized by the sixteenth section of the Act of Congress of July 1, 1862, and the sixteenth section of the Act of July 2, 1864, taken in connection with the second section of the Act of March 3, 1865, referred to in the findings of the court. The last-named Act ratified the transfer by the Central Pacific to the Western Pacific of a portion of its road extending from San José to Sacramento, and conferred upon the latter company all the privileges and benefits of the several Acts of Congress relating thereto, and subject to all the conditions thereof. If, therefore, the Central Pacific Railroad

Company is not a federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden City, were conferred upon it by Congress.

It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are and ever have been undoubted.

Power of Congress to authorize construction of railroads.

But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as federal corporations. See *Pacific Railroad Removal Cases*, 115 U. S. 1, 14, 18.

Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises, whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. What is a franchise? Under the English law, Blackstone defines it as

Right of State to tax franchises granted by Congress.

“a royal privilege or branch of the king’s prerogative, subsisting in the hands of a subject.” 2 Bl. Com. 37. Generalized and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the Legislature, direct or derived. These are franchises. No private person can take another’s property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland*, “The power to tax involves the power to destroy.” Recollecting the fundamental principle that the Constitution, laws, and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. The Bank of the United States*, 9 Wheat. 738; and *Brown v. Maryland*, 12 Wheat. 419, and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not

in conflict with the decisions of this court in *Thomson v. Pacific Railroad*, 9 Wall. 579, and *Railroad Co. v. Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. 18 Wall. 35, 37.

The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the Legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases.

It only remains to consider whether the Southern Pacific Railroad Company, as well as the Central Pacific, was invested with any franchises derived from the government of the United States. Of this we think there can be no question. The court below, in its findings of fact in the Southern Pacific case (No. 661), finds that the defendant is a corporation existing under the laws of California, except in so far as its existence, rights, privileges, duties, and obligations have been affected by various Acts of Congress. It then describes the course of the defendant's road, which commences on the waters of the Pacific Ocean, in the city of San Francisco, and extends thence southerly to Tres Pinos, in the county of San Benito, from which place to Huron, a distance of forty or fifty miles, a portion of the road is yet unfinished, and the road of the Central Pacific Company is temporarily used in its stead. From Huron the route of the road extends easterly to Goshen, and thence southerly to Mojave. At Mojave it separates into two main branches, — one extending in an easterly direction to the Colorado River, near the thirty-fifth parallel of north latitude, where it meets and connects with the Atlantic and Pacific Railroad, leading to Springfield, in the State of Missouri; the other branch extends southerly to Los Angeles and thence easterly to Fort Yuma, and connects with the Southern Pacific Railroad of Arizona, and by means of other roads forms a continuous line to New Orleans. The findings then continue to state as follows; namely, —

Investment of
Central and
Southern
Pacific roads
with federal
franchises.

“That on the twenty-seventh day of July, 1866, the government of the United States undertook to construct, or cause to be constructed, a line of railroad from a point at or near the town of Springfield, in the State of Missouri, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel

of latitude, as near as might be found suitable for a railroad route, to the Colorado River at such point as might be selected, and thence by the most practicable and eligible route to the Pacific Ocean; and to that end Congress passed an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Ocean,' which Act was approved on said twenty-seventh day of July, 1866, 14 Stat. 292, c. 278. By said Act, certain persons therein named were made and erected into a corporation under the name and style of the 'Atlantic & Pacific Railroad Company.'

"That to facilitate the construction of said road, the government of the United States, by said Act of Congress, adopted the defendant [the Southern Pacific Railroad Company] as the instrument or agent of the United States, and conferred upon defendant the same powers, and clothed defendant with the same privileges and immunities, which it conferred upon and clothed the Atlantic & Pacific Railroad Company with, except that the said defendant was to construct only that portion of said railroad between the Colorado River and the city and county of San Francisco.

"That said Atlantic & Pacific Railroad Company organized under said Act; . . . and said company and defendant, immediately after the passage of said Act, accepted the terms and conditions thereof, and have duly complied therewith.

"That said Atlantic & Pacific Company has fully completed the whole of said road from Springfield to the Colorado River, and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out.

"That on the third day of March, 1871, the government of the United States undertook to construct, or cause to be constructed, a line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado River to construct, or cause to be constructed, a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the Act of Congress of July 27, 1866, hereinbefore referred to, and by means of said connecting road to connect the road from Marshall to San Diego with the city of San Francisco; and to that end Congress passed an Act entitled 'An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March 3, 1870; and subsequently, on the second day of May, 1872, passed an Act entitled 'An Act supplementary to an Act entitled An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March 3, 1871. 16 Stat. 573, c. 122; 17 Stat. 59, c. 132.

“That immediately after the passage of said Act of March, 1871, the Texas Pacific Railroad Company was organized in pursuance thereof, and it and defendant accepted all the terms and conditions of each of said Acts of 1871 and 1872, and have fully and in every respect complied therewith and under them, and, in compliance with the spirit and intent of said Acts, have completed the roads mentioned in the third finding” [to wit, the line of the defendant’s railroads hereinbefore described].

An examination of the Acts referred to in these findings shows that Congress authorized the Southern Pacific Railroad Company to connect with the Atlantic & Pacific Railroad at such point near the boundary line of the State of California as it should deem most suitable for a railroad line to San Francisco; and, to aid in the construction of such a railroad line, Congress declared that the company should have similar grants of land, and should be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific. Like powers were also given to the Southern Pacific Railroad Company to construct a line of railroad from Tehachapa Pass, by way of Los Angeles, to the Texas Pacific road at the Colorado River (Fort Yuma). The Southern Pacific Company was not authorized by its original charter to extend its railroad to the Colorado River, as we already know by other cases brought before us, and as appears by the Act of the State Legislature, passed April 4, 1870, which assumed to authorize the company to change the line of its railroad so as to reach the eastern boundary-line of the State; thus duplicating the power given to it by the Act of Congress. (See the State Act quoted in 118 U. S. p. 399). This State legislation was probably procured to remove all doubts with regard to the company’s power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by Congress, and that franchise was accepted, and the roads have been constructed in conformity thereto.

It conclusively appears, therefore, that the Southern Pacific Railroad Company did receive from the United States government, and still enjoys, important franchises connected with its railroads.

It follows that in each one of the cases now before us the assessment made by the State board of equalization comprised the value of franchises or property which the board was prohibited by the Constitution of the State or ^{Same.} ~~Conclusions.~~ of the United States from including therein; and that these values are so blended with the other items of which the assessment is composed, that they cannot be separated therefrom. The assessments are, therefore, void. This renders it unnecessary to express any opinion on the application of the

Fourteenth Amendment, as the result would not be different, whatever view we might take on that subject.

The judgments in all the cases are affirmed.

Taxation of Franchises of National Corporations. — See note to *Allen v. Texas & Pacific R. Co.*, 24 Am. & Eng. R. R. Cas. 21.

STATE BOARD OF ASSESSORS

v.

PATERSON & RAMAPO R. CO.

(*New Jersey Court of Errors and Appeals*, May 23, 1888.)

Taxation. — Exemption. — Application of New Jersey Act of 1873. — Sect. 10, Act of New Jersey, April 2, 1873 (P. L. 1873, p. 112), providing that "whereas certain railroad corporations then owning and occupying railroads in the State, claim exemption from all taxation beyond that which was provided for by their charters or by special laws," therefore any such corporation might surrender all claims to exemption from taxation, and accept the provisions of that Act in lieu thereof, does not apply to a railroad having a repealable charter.

Same. — Revocability of Charter Provisions exempting from Taxation. — The provisions in the charter of a railroad company by which the Legislature limits its taxation, is not binding upon the State as an irrevocable contract, when both the Act, the incorporation, and its supplements expressly provide that its provisions shall be subject to the will of the Legislature to repeal, modify, or amend.

ERROR to Supreme Court.

John P. Stockton, Attorney-General, and *Barker Gummere*, for plaintiff in error.

John Hopper and *Joseph D. Bedle* for defendant in error.

McGILL, Ch. — The tax assessment in question was made against the franchises and property of the Paterson & Ramapo Railroad Company, under the provisions of the "Act

Facts. for the taxation of railroad and canal property," approved April 10, 1884. P. L. 1884, p. 142. The judgment of the Supreme Court set the assessment aside, and declared it to be void, in consequence of the opinion of that court in the case of *Railroad Co. v. Board, etc.*, 48 N. J. Law, 1, upon the constitutionality of the Act under which the assessment was laid. Subsequently, by the judgment of this court in that case upon error, the constitutionality and validity of the tax was maintained.

48 N. J. Law, 146. The defendant in error now claims that it has an irrepealable contract with the State, which limits the power to tax it, by the provisions of the "Act to establish just rules for the taxation of railroad corporations, and to induce their acceptance and uniform adoption," approved April 2, 1873. The Paterson & Ramapo Railroad Company was incorporated by an Act of the Legislature of this State passed March 10, 1841 (P. L. 1841, p. 96), and by the twenty-second section of that Act was subjected to a tax of five cents for every passenger, and eight cents for every ton of freight, transported "on" its road. The Act provided that no other State tax should be levied or assessed on said company, and also that it should be lawful for the Legislature, at any time thereafter, to alter, amend, or modify the Act whenever, in its opinion, the public good might require it. A supplement to this charter was passed on Feb. 28, 1844 (P. L. 1844, p. 136), which provided that the payments to the State for passengers and freight transported should be construed to be for passengers and freight transported "over" the road, "and that the exemption from taxation should be construed to extend only to taxes for the use of the State, any thing in said Act to the contrary notwithstanding." Another supplement to the charter was approved April 1, 1845, which provided for a tax of one-half of 1 per cent upon the capital stock expended until the net earnings of the road should amount annually to 6 per centum on the cost thereof, and from that time a tax of 1 per centum, and that such tax should be received and taken in full discharge and satisfaction "of the transit duties of five cents a passenger, and eight cents a ton, provided for in the twenty-second section of their Act of incorporation," and that the Legislature might, at any time thereafter, alter, modify, or repeal that supplement. By an Act of the Legislature approved April 2, 1873 (P. L. 1873, p. 112), which was entitled "An Act to establish just rules for the taxation of railroad corporations, and to induce their acceptance and uniform adoption," a State tax was imposed upon all railroad corporations after the rate of taxation which was theretofore imposed by law upon them, respectively, or, in default of such imposition, one-half of 1 per centum upon the cost of their respective roads, equipments, and appendages, and also an annual county and municipal tax of 1 per centum upon their realty outside of the main stem of the road. The tenth section of that Act provided that, whereas certain railroad corporations then owning and occupying railroads in the State claimed exemption from all taxation beyond that which was provided for by their charters or by special laws, which claims, even if legal, subjected the corporations to the ill-will of the public, and made it to their interest to forego the same, and agree to the scheme of taxation established

by that Act, that, therefore, any such corporation might within six months from the approval of that Act, make a declaration in writing, under its common seal, signed by its president, surrendering all claim of exemption from taxation, and accepting the provisions of that Act, in lieu thereof, and file such declaration in the office of the Secretary of State. On the twenty-seventh day of September, 1873, in the form provided by the Act last mentioned, the Paterson & Ramapo Railroad Company declared that it made claim to exemption from taxation in excess of that which was provided for in its charter, and the supplements thereto, and that it surrendered such claim, and accepted the provisions of the said Act of 1873, and filed that declaration in the office of the Secretary of State. It is claimed for the defendant in error, not only

Contention of
defendant in
error.

that, before the Act of 1873 it had an irrepealable contract with the State upon the subject of its taxation, but that by its action, under that Act, it obtained such a contract. It has been held by this court, in *Railroad Co. v. Commissioners*, 38 N. J. Law, 472, that the tenth section of the Act referred to, under which the defendant's intended surrender was made, does not extend to corporations that have repealable charters on the subject of their taxation. This position, as will be seen by an examination of the case cited, is manifestly founded in sound reasoning, and is the only conclusion which can be reached that will give effect to the first nine sections of that law. It is not affected by the reversal of the judgment of this court in that case in the Supreme Court of the United States. 95 U. S. 104.

We are, then, brought to the question whether the Paterson & Ramapo Railroad Company had an irrevocable contract with the

Contract of
Paterson Com-
pany with State
on subject of
taxation.

State, upon the subject of taxation, prior to the Act of 1873. The presumption is against such contract. Mr. Justice Swayne, in *Tucker v. Ferguson*, 22 Wall. 527, says: "The taxing power is vital to the function of government. It helps to sustain the social compact, and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. . . . It may be restrained by contract, in special cases, for the public good where such contracts are not forbidden. But the case must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all." This is the settled doctrine of the United States Supreme Court. *Railroad Co. v. Board*, 93 U. S. 598; *Railroad Co. v. Commissioners*, 112

U. S. 609; Railroad Co. *v.* Wright, 116 U. S. 231; Railroad Co. *v.* Dennis, 116 U. S. 665; Railroad Co. *v.* Guffey, 120 U. S. 569. It is, however, determined beyond all controversy that a State, unless its constitution restricts it, may bind itself by contract in treating with a corporation upon the subject of taxation. It may create such a contract by positive statutory enactment so irresistibly clear that its intention to irrevocably bind itself cannot be mistaken, or it may couple its bounty with conditions which may require the corporation to render a consideration for a partial or entire exemption from taxation. Such consideration may arise from a service, a duty, an expenditure, or other remunerative condition imposed upon the corporation, either directly or as a consequence of the exercise of privileges and franchises conferred by the same legislation. College *v.* Woodward, 4 Wheat. 518; Hospital *v.* Philadelphia Co., 24 How. 300; Tucker *v.* Ferguson, 22 Wall. 527; University *v.* People, 99 U. S. 309. Where, however, the legislation limiting taxation is of such a character that there is no positive declaration of a permanent and irrevocable exemption or commutation, and nothing is exacted from the corporation which must operate as a consideration therefor, it is a gratuity, not a contract. Hospital *v.* Philadelphia Co., Tucker *v.* Ferguson, Railroad Co. *v.* Board, *supra*. An illustration of legislation of this kind is furnished in the first of these cases. In 1833 an Act was passed by the Pennsylvania Legislature which recited the charitable character of the Christ Church Hospital of Philadelphia, the dilapidation of its buildings, and the increasing burden of its taxes upon its slender means, and enacted "that the real property including ground-rents, now belonging and payable to Christ Church Hospital in the city of Philadelphia, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes." This exemption was held to be a spontaneous concession of the Legislature, which required no consideration from the corporation in return for it, and was revocable at the pleasure of the sovereign. Legislation may be of such a character that it would be, in effect, a contract but for express provisions in it which subject it to the will of the Legislature. Such legislation binds only until it is repealed by subsequent enactment. That which is under consideration belongs to this class. In the charter of 1841, the right to alter, amend, or modify that statute, whenever the public good should, in the opinion of the Legislature, require it, and, in the supplement of 1845, the right to alter, modify, or repeal that statute, was expressly reserved, and no special conditions were attached to the clauses which limit taxation that now restrain the Legislature in the exercise of that right. It is clear that neither the charter in question nor its supplements involve the State

in contract upon the subject of the defendant's taxation. The defendant had no substantial claim to surrender, and was not among the corporations contemplated by the tenth section of the Act of 1873, above referred to. It was taxable under the other sections of that Act, and is now subject to taxation under the Act of 1884. *Railroad Co. v. Commissioners, supra.*

It is insisted, for the defendant, that the value of property belonging to another corporation has been included in the assessment objected to, and that the amount so included should be ascertained and eliminated. This question was not considered by the Supreme Court. It should be dealt with in that court. The judgment of the court below should be reversed, and the record should be remitted to the Supreme Court, that it may render its judgment anew. Unanimously reversed.

Exemption of Land bought for Railroad Purposes.—In *St. Paul M. & M. R. Co. v. City of St. Paul* (Minn.), 38 N. W. Rep. 925, the question before the court was whether certain land was exempt from taxes and assessments under sect. 18 of the company's charter. The construction of this section, and a similar one in another charter, was recently before the same court in *County of Ramsey v. Railway Co.*, 33 Minn. 537; *County of Todd v. Railway Co.*, 31 Am. & Eng. R. R. Cas. 482. The court held in these cases that the exemption from taxation extends only to such property as may be fairly said to be held and presently used for railroad purposes; and the property not so used, although held with the purpose at some future time of devoting it to such use, is not within the exemption. It was said, however, that this does not mean that the exemption will not under any circumstances apply to property not for the time in actual use, as the word is ordinarily applied; that, as some time must necessarily elapse between the date of the acquisition of property and the date at which it can be prepared for and put to actual use for railroad purposes, hence lands purchased in good faith for the purposes of so using them as soon as present plans are fully executed, and the process of appropriating them to such uses proceeds without unreasonable delay, would be within the fair construction of the exemption, although not yet put to actual use. "But," say the court, "the exemption would not apply to lands not being thus appropriated to use, but merely held for possible, or even probable, future use." As was said in *County of Ramsey v. Railway Co., supra*: "These charters do not exempt the property from taxes, but provide a substituted method of taxation, based upon the assumption that the property of the companies will be used for railroad purposes, and thereby an income be derived, the percentage of which received by the State will be equivalent in its results to taxation of the property. In so far as the property is not so used this end is not accomplished, because it yields no income to the corporation, and hence no revenue to the State." Hence, while it may be, and doubtless is, wise railroad management to buy and hold large tracts of land with reference to the probable or possible future needs of the road, yet such lands are not within the exemption until appropriated to present railroad uses, as that term has been already defined.

"It remains to apply this rule to the facts of the present case. It is apparent from what has been said that no precise rule can be laid down that will determine with absolute certainty in every case whether the property is within the exemption. This will often be, under the evidence, rather a question of

fact than of law. This is so to a certain extent in the present case. The court below did not, and was not required to, make any findings of fact, but merely overruled the objections to the assessments, and ordered judgment against the property. In reviewing this order the question for us to determine, is whether the evidence would sustain the finding of such facts as would justify the conclusion that this property was not exempt. If it would, we cannot say that there was error. While there was no conflict of evidence, the president of the railway company being the only witness examined, yet, taking the whole of his testimony together, we think the conclusion might be fairly drawn from it that this property had been acquired, and was being held, merely for the possible, or perhaps probable, future use of the corporation, in view of its probable need of greater terminal facilities at some future time, but that it has never been appropriated, or put in process of appropriation, to any railroad use. If so, then, within the doctrine of the cases referred to, the land was not within the exemption."

Taxation of Logs cut for Sale upon Lands exempt from Taxation. — In *State v. Northern Pac. R. Co.* (Minn.), 38 N. W. Rep. 635, the question for consideration was the taxability of a quantity of pine logs cut upon lands belonging to the Northern Pacific R. Co., which lands were confessedly exempt from taxation by virtue of sect. 1, c. 8. Sp. Laws, 1865, and sect. 1, c. 45, Sp. Laws, 1870, and were acquired by the Act of Congress, of July 2, 1864, in which every odd numbered section of land, not mineral, and lying within ten miles of its proposed line of railway, was by the general government, granted the appellant to aid in the construction and operation of its road. In the winter of 1886, appellant entered upon a portion of its lands, so granted, cut down trees thereon standing, converted them into logs for the purpose of sale, and actually did sell the same after May 1, following. After the severance, and before the sale, the proper officials levied the tax, which the company refused to pay, upon the sole ground that the logs were exempt from taxation. The court said: "By means of the Acts of the Legislatures of 1865 and 1870, above cited, the appellant, in lieu of other taxation upon its 'lands, franchises, property, stock, and capital,' is permitted to pay into the State treasury a per centum of its gross earnings. And while the language used in the Acts mentioned is broad and comprehensive, it is well settled in this State that it embraces but two classes of real property,—the first, the lands granted defendant by the general government; the second, such real property as may be used in the operation of its railway. *County of Ramsey v. Railway Co.*, 33 Minn. 537; *County of Todd v. Railroad Co.*, 31 Am. & Eng. R. R. Cas. 482. It may also be safely asserted, that only such personality is exempt as is held and used in the proper purposes of the corporation, in the carrying on of the business for which it was given life, and for repairs and further construction. These propositions are not seriously controverted by the appellant, and are decisive of its case, because, when severed from the soil, these logs were no longer a part of the exempt land grant, became personal property at once, and as such (having been cut for sale, and not for use upon the railway) subject to the revenue laws of the State, precisely as property of the same character owned by a private individual or some other corporation. Its line of argument is, that when exempting the lands the Legislature had in view the fact that they were chiefly valuable for the growing timber thereon, and that those who held them designed the most advantageous disposition possible; that, as it was entitled to realize in any manner, it could sell the land outright, or could sell the timber, retaining the land, or could itself cut off and market the pine. Unquestionably the appellant could have pursued any method of disposal which would not change the character of that which was real estate, and as such exempt from taxation. But we doubt if there is any force in appellant's suggestion (the base of his argument) that the Legislature had in mind or expected that a corporation formed to construct a railway across a continent would ever

engage in an enterprise so foreign to its purpose as is lumbering, by putting its own men and teams into the woods, or by contracting with those who make it a business to cut for others. The rule is well settled, that 'statutes imposing restrictions upon the taxing power of the State, except so far as they tend to secure uniformity and equality of assessment, are to be construed strictly;' and if we depart from the proposition, that, wherever the form of exempt property changes (as it has in this case from real to personal) from that clearly within the exemption, it ceases to be favored, there is no safe place to halt, and no defined limit in the degree of departure. This is apparent from the facts here. The appellant has by its skilful labor, by cutting and marketing its timber, greatly decreased the value of its land, and doubled or trebled the value of the pine which grew thereon. If it can double or treble this value by adding labor to it, and still claim the benefit of the exempting statute, it can as safely increase the value a hundred-fold. If it can make its standing timber into saw-logs without incurring the burden of taxation, and upon a plea that such a disposition is justified, and was contemplated because advantageous, it can with equal propriety convert the logs into boards, and thence through all the grades of manufacturing to the furnished article of merchandise. The argument advanced that cutting into logs promotes the interests of the appellant by enabling it to realize more for its lands, and therefore must have been meditated by the Legislature, is as pertinent when the logs are cut into boards, and when the boards are made into boxes, as at any prior point in the attempt to convert the natural product of the soil into cash. And the argument is just as appropriate should the appellant discover minerals upon its lands, and mine and market the same. The only safe and consistent rule to adopt is that fixed by the court below."

Exemption of Elevator situated Some Distance from Road.— In *State v. Nashville, C. & St. L. R. Co.* (Tenn.), 6 S. W. Rep. 880, it was held that under the charter of a railroad exempting from taxation the road, its franchises, warehouses, etc., an elevator situated some distance from the road, necessary for and used as a warehouse, and so much land as is occupied by it, and so much land as is necessary for spurs and side-tracks connecting the elevator with the railroad, are exempt, the elevator being located at such distance on account of natural disadvantages.

The court said: "The railroad company, under its charter, is exempt from taxation, for a period of twenty-five years (now nearly expired), as to its road, with all its fixtures and *appurtenances*, including the workshops, *warehouses*, and vehicles of transportation. It is manifest that the elevator is merely a depot or warehouse, and the tracks leading thereto, and in connection therewith, are only side-tracks or spurs, and as such are exempt under the express terms of the charter as above quoted. If these extensions be not necessary or proper to the exercise and enjoyment of its franchise under its charter, then the State could, by appropriate proceedings, question its right to extend its track; but if the addition and erection be legally made, under its charter, they are, under the same instrument, exempt from taxation for the years for which this suit is brought.

"All the rights, privileges, and immunities appertaining to the franchise of the Nashville & North-western Railroad were sold and decreed to the defendant company under foreclosure proceedings inaugurated by the State, and under the special terms of the State's decree, as was held by this court in the case of *State v. Railroad*, 12 Lea, 583, passes to the purchaser the exemption from taxation. This exemption embraces manifestly property in the shape of tracks and depot or warehouse buildings, laid and erected after the purchase, and rolling-stock necessary for its operation acquired afterwards as well as before, so long as such tracks, depot, warehouses, etc., were rightfully acquired as appertaining to the due operation of the road under its charter. The question now and here is not one of a right to the exemption stipulated for in the charter,

but whether the property in question is a warehouse, and the side-track or spur are appurtenances, under the charter, and as such entitled to the benefits of the exemption, where they are removed, as shown, from the right of way of the company. If the elevator, under the proof in this case, be a depot or a warehouse, and the side-tracks connected therewith be appurtenances, it must follow that they are exempt under the adjudication referred to. It has been elsewhere held, 'A general exemption of railroad property is co-extensive with the right of the railroad company to take property for its use by condemnation, and the limit of such right is the limit of the exemption.' *State v. Hancock*, 33 N. J. Law, 315; *Railway v. Milwaukee*, 34 Wis. 271. It will not be deemed that the company here could have condemned the ground necessary for its spur tracks and the building in question. Let decree, be entered as herein directed."

Exemption of Lands until "sold or conveyed." — Where a railroad company to which lands are granted by the State to aid in the construction of its road, such lands to be exempt from taxation until "sold and conveyed," has sold the lands and received the consideration, so that it retains no lien upon nor actual interest in them, though it retains the naked legal title only as trustee for the purchaser, it has "sold and conveyed" them within the meaning of the exempting clause. In such case, the effect in this particular of the contract, and the *status* of the lands as to taxability, are not affected by the fact that a controversy between the parties to the contract as to the quantity and specific tracts sold by it arose, and had to be settled by the judgment of a court. *State v. Webber* (Minn.), 37 N. W. Rep. 949.

Exemption of Company purchasing Road whose Charter originally provided for Exemption. — An Act of the General Assembly of Virginia (Acts 1845-46, p. 90) provided, *inter alia*, that the purchasers of the Portsmouth & Roanoke Railroad Company, of which the appellant company is the successor, should become "*ipso facto*, by the purchase . . . a body politic and corporate by the name and style of the Seaboard & Roanoke Railroad Company, and . . . hold, use, enjoy, and employ the road, and all the other property and effects of every nature and kind, as aforesaid, of the present company, with all the rights, franchises, privileges, and immunities granted to and conferred upon it at any time heretofore by this State, . . . in as ample a manner as the Legislature of this State can confer them, subject, in all respects and in all things, to all the duties, regulations, and penalties required, described, and enjoined by any law or laws now in force respecting the present company." *Held*, that the appellant company could not claim exemption from taxation under this Act upon the ground that the charter of the Portsmouth & Roanoke Railroad Company originally provided for such exemption, when it further appeared that said company had voluntarily waived its right, previous to the date of said transfer, to claim such exemption, by permitting itself to be brought within the provisions of the general railroad law (Acts 1836-37, p. 101) in consideration of certain benefits conferred by the Legislature and accepted by the company in lieu of said original charter privilege. *Seaboard & R. R. Co. v. Norfolk Co.* (Va.), 2 S. East. Rep. 278.

Exemption by Payment of Certain Sum in Lieu of Taxes. — **To what Such Exemption applies.** — By the first section of an Act of the General Assembly of the State of Delaware, passed April 11, 1873, it was enacted, "That the treasurer of the State be and he is hereby authorized and directed to accept and receive from the Philadelphia, Wilmington & Baltimore Railroad Company, in the year of our Lord 1873, and in each and every year thereafter, until otherwise directed by the Legislature, the annual sum of \$27,000, to be paid in equal quarterly payments on the first day of July, October, January, and April of each year; the first payment to be made on the first day of July next, in lieu of all taxes which may hereafter become due from said company

in each year as aforesaid under any and all laws of this State, except such taxes as may become due under the provisions of an Act entitled 'An Act to raise Revenue for this State,' passed Aug. 11, 1864." And by the second section, thus: "Upon the payment by the said Philadelphia, Wilmington, & Baltimore Railroad Company to the treasurer of the State of the said sum of \$27,000 in equal quarterly payments as aforesaid in any year, it shall be the duty of the said State treasurer, and he is hereby authorized, to execute and deliver to said company a proper acquittance and discharge from the payment of all taxes due or to become due in the year for which such payment shall have been made, except the taxes due or to become due under the provisions of the aforesaid Act," etc. *Held*, (a) That upon the payment of the amount therein specified, the company was exempt as such from all other taxes, and could not thereafter be assessed for local purposes. (b) That this exemption applied only to the road-bed and appurtenances, and did not include other real estate owned by the company, and that this latter might be lawfully assessed for all purposes. (c) That while there is an adequate remedy at law for persons compelled to pay taxes unlawfully assessed, yet in a case like this, when the line of the road runs through different tax districts, in all of which it may be assessed, a court of equity will interfere by injunction to prevent the unlawful assessment and collection. *Philadelphia, W. & B. R. Co. v. Neary* (Del.), 6 Cent. Rep. 857.

Act providing that Payment of Certain Sum shall be in Lieu of all Taxes includes Taxes for County Purposes. — It is the meaning and intention of the Act of April 11, 1873 (14 Del. Laws, 339, Amended Code, 44), that the sums stated therein, when paid by the Philadelphia, Wilmington, & Baltimore R. R. Co., to the State treasurer, should be in lieu of, or in exchange for, all taxes which might thereafter become due from said company in each year under any and all laws of this State, subjecting said company to taxation for the benefit of the State or any part of it, including taxation upon its road-bed or right of way in a county collection district for county purposes, under the general law of the State. *Neary v. Philadelphia, W. & B. R. Co.* (Del.), 8 Cent. Rep. 651.

STATE *ex rel.* CARR

v.

WOODRUFF SLEEPING AND PARLOR COACH CO.

(*Indiana Supreme Court, March 9, 1888.*)

Taxation of Earnings of Sleeping-car Company engaged in Interstate Commerce. — A sleeping-car company, engaged in the business of transporting passengers from one State to another, is not subject to have a State tax levied upon its gross earnings. The fact that the amount of tax is restricted to the distance passengers are carried through the State does not render it valid, for the tax assumed to be levied is upon interstate commerce, and not upon the internal commerce of the State.

Same. — Tax for Privilege of doing Business in State. — In no event can a corporation engaged in the business of interstate commerce be taxed for the privilege of doing business in a certain State.

APPEAL from Circuit Court, Marion County; Alexander C. Ayres, Judge.

L. T. Michener, Attorney-General, and *John H. Gillett*, for appellant.

A. C. Harris, *William H. Calkins*, and *O. T. Morton* for appellee.

ELLIOTT, J. — The relator, as auditor of State, avers in his complaint that the defendant is a corporation organized under the laws of another State; that for more than two years past it has been engaged in the business “of conveying to, from, and through the State of Indiana passengers for hire, in sleeping-cars, under contracts with railway companies for the transportation of its cars; that during the year immediately preceding the first day of April, 1887, it earned and collected for the transportation of passengers in its cars in this State, and by the transportation of passengers by continuous passage, for an entire consideration, from other States into and across this State and other States, a large sum of money, to wit, one million of dollars, of which sum two hundred thousand dollars represented and was the proportion which the distance travelled in this State bore to the whole distance paid for; that, notwithstanding the receipt of such money, the defendant has wholly failed to report to plaintiff’s relator its receipts, or any part thereof, and has wholly failed to file any report whatever.” The complaint is based upon the following statute: “Every joint-stock association, company, or corporation, incorporated under the laws of any other State, and conveying to, from, and through this State, or any part thereof, passengers and travellers in palace-cars, drawing-room cars, sleeping-cars, or chair-cars, on contract with any railroad company, or the manager, lessee, agent, or receiver thereof, shall be held and deemed to be a sleeping-car company. Every such sleeping-car company doing business in this State shall annually, between the first day of April and the first day of June, report to the auditor of State, under the oath of an officer or agent of such corporation, the gross amount of all its receipts, within or without the State, for fares earned, or business done, by such company within this State for the year then next preceding the first day of April of the current year; and, in computing such gross receipts, the same shall be in the proportion that the distance traversed in this State bears to the whole distance paid for. At the time of making such report, such company shall pay into the treasury of the State the sum of two dollars on every one hundred dollars of such receipts. Every sleeping-car company failing or refusing, for more than thirty days after the first day of June, to render an accurate account of such gross receipts,

as above provided, and to pay the required tax thereon, shall forfeit twenty-five dollars for each additional day such report and payment shall be delayed, to be recovered in an action in the name of the State of Indiana, on the relation of the auditor of State, in any court of competent jurisdiction, and the attorney-general shall conduct such prosecution; and such sleeping-car company, so failing or refusing, shall be prohibited from carrying on such business until such payment is made. All railroad companies in this State, or the persons managing or operating the same, are prohibited from hauling any cars of any sleeping-car company while so in default, and for each violation of this prohibition shall be liable to pay to the State of Indiana the sum of one hundred dollars, to be recovered in the proper action by the State; and it shall be the duty of the attorney-general, at the request of the auditor of State, to prosecute all such suits."

It is firmly established, that a State has power to prescribe the terms upon which a foreign corporation may do business within

**Power of State
to prescribe
terms upon
which foreign
corporation
may do busi-
ness.**

its territory, unless the corporation is engaged in the business of interstate commerce. If it is not engaged in transacting business of that kind, the State may levy a tax upon its receipts within this State, and enforce collection. *Insurance Co. v. Burdett*, 112 Ind. 204; *Doyle v. Insurance Co.*, 94 U. S. 535; *Ducat v. Chicago*, 10 Wall. 410; *Insurance Co. v. French*, 18 How. 404; *Goldsmith v. Insurance Co.*, 62 Ga. 379; *Insurance Co. v. Welch*, 29 Kan. 672; *People v. Fire Ass'n*, 92 N. Y. 311, 44 Amer. Rep. 380. In the cases referred to, this principle is explicitly and strongly asserted, and in many cases it has been assumed without discussion, and applied as a settled rule of law. *Insurance Co. v. Brim*, 111 Ind. 281; *Aid Ass'n v. Porter*, 58 Vt. 581; *Ohio v. Moore*, 39 Ohio St. 486; *State v. Insurance Co.*, 81 Mo. 89; *State v. Insurance Co.*, 25 N. W. Rep. 81; *Ehrman v. Insurance Co.*, 1 McCrary, 126; *Insurance Co. v. Bales*, 92 Pa. St. 352. We cannot, therefore, assent to the argument of counsel which assumes that a State may not classify and regulate foreign corporations, even though they are not engaged in the affairs of interstate commerce. We do affirm, however, that in matters of commerce between the States the power of the federal government is exclusive and supreme. The later decisions of the

**State has no
power over
interstate
commerce.**

Supreme Court of the United States close the question to us and to all State courts; for it is a federal question, and on such questions the decisions of that high tribunal are final. Its earlier decisions were not harmonious, — there was much of conflict, and more of confusion; but the later cases have carried the doctrine to the utmost length. These decisions have much restricted, if, indeed,

they have not completely annulled, the police-power of the States, where interstate questions are involved, and they have in effect swept away all State lines. In a very late case it was said by Mr. Justice Bradley, speaking for the court, that, "in a word, it may be said that in the matter of interstate commerce the United States are but one country, and are, and must be, subject to one system of regulations, and not to a multitude of systems." *Robbins v. Taxing Dist.*, 120 U. S. 489; s. c., 16 Am. & Eng. Corp. Cas. 1. Although the chief justice and two of the associate justices in a vigorous opinion dissented, the decision is to us as law. But there are other decisions of that court which, while not going so far as the decision in the case from which we have quoted, go quite far enough to require us to decide that the State has no power to levy a tax upon the earnings of a sleeping-car company engaged in the business of transporting passengers from one State to another. *Steamship Co. v. Pennsylvania*, 122 U. S. 326; s. c., 18 Am. & Eng. Corp. Cas. 1; *Telegraph Co. v. Pendleton*, 122 U. S. 347; *Railway Co. v. Illinois*, 118 U. S. 557; s. c., 26 Am. & Eng. R. R. Cas. 1; *Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Transportation Co. v. Parkersburg*, 107 U. S. 691; *Telegraph Co. v. Texas*, 105 U. S. 460; *Telegraph Co. v. Telegraph Co.*, 96 U. S. 1; *Welton v. State*, 91 U. S. 275. In the case first cited, one of the points decided in the State Freight Tax Cases, 15 Wall. 282, was declared to be wrongly decided, and it was held that "a tax upon freights and fares is virtually a tax upon the transportation itself," and this tax no State can levy. The rule as established by the recent decisions, which stand as law to us, is thus stated in *Robbins v. Taxing Dist.*, *supra*: "As before said, the State may tax its own internal commerce, but that does not give it any right to tax interstate commerce."

Same. No power to tax earnings of sleeping-car company.

The attorney-general ably and ingeniously argues that the statute is valid, because it is competent for the State to "tax the local occupation of appellant by the measure of its gross receipts for the proportionate amount of travel in this State." But this argument, while not without plausibility, is radically unsound. Under the law as authoritatively declared by the court of last resort, no tax in any form, or for any purpose, can be laid upon interstate commerce. The matter of interstate commerce is a national matter, with which States can in nowise interfere. The jurisdiction of the federal government absolutely excludes the States from directly or indirectly hampering or taxing the commerce between the States.

The claim of the State is also put upon the ground that the appellee can be compelled to pay a tax upon its gross earnings

for the privilege of doing a local business in Indiana. This position is untenable. In no event can a corporation engaged in the business of interstate commerce be taxed for the privilege of doing business in this or any other State. This principle early found a place in our jurisprudence. Much as the highest court of the nation has wavered upon kindred questions, from this principle it has never departed. Indeed, one of the great causes which led to the adoption of our federal Constitution was the evil produced by the levying of tribute, in the form of taxes, upon the commerce between the States, by some of the States, under the articles of Confederation. It is evident that to permit each State to levy taxes upon the earnings of common carriers whose lines of railroad traverse its territory would lead to deplorable results; for, once the power is conceded, then the method of its exercise, the amount of the tax, and like matters would be within the exclusive control of the Legislature of each State, as neither the Federal nor the State courts could supervise or control their discretion.

The complaint does not aver that passengers were carried from point to point within the State; on the contrary, the theory of that pleading is, that the State may levy a tax upon the gross earnings of the corporation in the proportion that the distance travelled through this State bears to the entire distance for which fares were received. That theory is unsound, and the complaint bad. It is, however, not the fault of the pleader that the complaint falls, for it is constructed upon the statute as well as a complaint can be constructed. The statute itself is without force. The statute is invalid, because it assumes to tax interstate commerce. It is true that it restricts the amount of the tax to be paid by the corporation to the distance passengers are carried through this State; but that does not relieve it of the objection we have stated, for the tax it assumes to levy is upon interstate commerce, and not upon the internal commerce of the State. A man on his way to the seaboard, who travels through Indiana, is carried in the course of the interstate commerce, and not in the course of domestic commerce; and a fare received from him is received in the matter of interstate commerce. A fare thus received no State can tax.

The complaint is bad, and the judgment is affirmed.

Taxation upon Earnings of Carrier engaged in Interstate Commerce.—See *Fargo v. Stevens*, and note, 31 Am. & Eng. R. R. Cas. 452.

See also *Southern S. S. Co. v. Pennsylvania*, and note, 18 Am. & Eng. Corp. Cas. 11.

OREGON SHORT LINE R. Co.

v.

YEATES, Assessor.

(Idaho Supreme Court, Feb. 20, 1888.)

Taxation. — Machinery and Repair-Shops should be assessed by Local Assessor. — Where machinery and repair-shops are situated upon lands other than the right of way, but are connected with the main line of the railroad by side tracks, *held*, that under sect. 1463, Rev. St., they should be assessed by the local assessor rather than by the Territorial board of equalization.

APPEAL from District Court, Alturas County ; before Justice Broderick.

Bill for injunction by Oregon Short Line Railway Company against W. W. Yeates, assessor of Alturas County. Injunction granted, and defendant appeals.

V. Bierbower and *R. Z. Johnson* for appellant.

P. L. Williams for respondent.

HAYS, C. J. — By the Act of Congress of March 3, 1875 (1 Supp. Rev. St. U. S. 187), the right of way was granted through the public lands of the United States in this Territory to any railway company duly organized under the laws of any State or Territory, upon certain conditions, to the extent of a hundred feet on each side of the centre line of said road, “also grounds adjacent to such right of way for station buildings, depots, machine-shops, side-tracks, turn-outs, and water stations,—not to exceed in amount twenty acres for each ten miles of road.” The respondent company was duly organized, and obtained the right of way, under said Act, through the lands of the United States in this Territory, and built their road thereon. Section 1463 of the Revised Statutes of this Territory is as follows: “The president, secretary, superintendent, or other principal accounting officers of any railroad or telegraph company having property in this Territory, whether incorporated under the law of this Territory or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list for assessment and taxation, verified by the oath of the person so listing, all the following described property belonging to said corporation within the Territory ; viz., road-bed, superstructure, right of way, and all structures situate thereon, rolling stock, side-track, telegraph lines, furniture and fixtures,

Facts.

and personal property, belonging to such corporation. Such list shall contain, first, the number of miles of such railroad or telegraph line in the Territory, and the number of miles of the same in each organized county therein; and such return must be made to the Territorial comptroller on or before the first day of April, annually. If the return aforesaid be not received by said comptroller by the third day of May, he must thereupon proceed to obtain the facts and information aforesaid in any manner that may appear most likely to secure the same correctly, and for that same purpose may address a written communication to the corporation, or to some officer of the corporation, who has failed or refused to make the return aforesaid. As soon as practicable after the comptroller has received said return, or procured the information to be set forth in said return, a meeting of the Territorial board of equalization, consisting of the governor, Territorial treasurer, and comptroller, shall be held at the office of said comptroller; and the said board must then value and assess the property of said corporation for each mile of said road or line, the value of each mile to be determined by dividing the sum of the whole valuation by the number of miles of said road or line. In making up such valuation or assessment, the said board shall examine and consider the return herein required to be made, or the information procured by the comptroller in default of such return, together with such other reliable information relative thereto as they may be able to procure. Said board shall not assess the value of any machine-shop or repair-shop, or other buildings not situated on said right of way or grounds or other real estate of any corporation or company within this Territory; but it shall be the duty of the assessor of the county, city, or district in which said machine or repair shops, or other buildings or grounds, or other real estate, is situated, to assess the same, and make return thereof, in the manner provided for the assessment and return of real estate belonging to individuals, on or before the second Monday of May, or as soon thereafter as the said board, or any two thereof, shall have made and determined said valuation and assessment. The Territorial comptroller must certify to the clerks of the boards of county commissioners of the several counties in which property of the aforesaid corporations, or any part thereof, may be situated, the assessment per mile so made on the property of any such corporation, specifying the number of miles, and amount, in each of said counties. The county commissioners must thereupon divide and adjust the number of miles, and the amounts falling within each precinct, city, town, school-district, or other division, in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property, or assessment rolls, returned by the several

assessors. The comptroller must certify whether a return was made to him by such corporation, or proper officer thereof, or whether the information required in and by such returns was procured by himself; and in case the return was not made as required by this Act, or, being made, was not sworn to, it is the duty of the county commissioners to add any amount not exceeding ten per cent to the valuation thus brought before them.

The officers of the railroad company, in listing its property, pursuant to this statute, for assessment by the Territorial board of equalization, listed, together with their road and right of way, the machine and repair shops, and the other property described in the complaint, which is situate at Shoshone in Alturas County. The said board assessed the right of way and such property as they found to be thereon, but did not assess the property described in the complaint, because they thought the same was not upon the right of way, and that they had no authority, under the statute, to do so, and notified the assessor of Alturas County of this fact. The county assessor then assessed the same, and made return thereof. The respondent then brought this action to restrain this appellant from assessing or collecting any tax on the property described in the complaint. The case coming on to be heard, the facts were stipulated as follows: "(1) It is hereby stipulated, by and between the parties hereto, that the machine and repair shops, round-house, and other buildings mentioned in the pleadings herein, and situated at Shoshone station, in said county, are more than one hundred feet from the main track of plaintiff's railway, and within four hundred feet thereof; that the said main track, at and near shops and other buildings, runs in an easterly direction, and said shops are on the south side of said main track; that there are three side-tracks, running through or near said shops and buildings, which are united, by means of switches, both to the east and west thereof, into a single side-track; and such single track unites, by means of switches, with the said main track, both east and west of said shops. (2) That said side-tracks, so extending to, through, and near said shops and other buildings, afford the means of running locomotive engines and cars from said main track into and out of the said shops and round-house, and connect with a turn-table situate between said main track and said round-house, constructed and used for the purpose of turning engines. (3) That said side-tracks, so extending to said shops, round-house, and turn-table, and the said turn-table and buildings, are used by the plaintiff for changing its engines and cars, affording the means of necessary repairs, and also to enable the plaintiff to supply its engines with coal from a large coal platform situated west of and near to said shops, and on either side of which there is one of said tracks

extending to and near said shops and other buildings. (4) That said shops, round-house, turn-table, and tracks leading thereto are used by the said plaintiff exclusively with, and in connection with, the operation of its said railway, and are necessary for such operation, but are not used for the purpose of running trains over the same, or for the transaction of its business as a common carrier." The injunction prayed for was granted, and an appeal taken to this court.

We are now called upon to construe the statute above quoted, so far as it relates to this action. In construing statutes of this nature, Judge Cooley, in his very excellent work on taxation, says, "The underlying principle of all construction is, that the intent of the Legislature should be sought in the words employed to express it; and that when found it should be made to govern, not only in all proceedings which are had under the law, but in all judicial controversies which bring those proceedings under review. Beyond the words employed, if the meaning is plain and intelligible, neither officer nor court is to go in search of the legislative intent; but the Legislature must be understood to intend what is plainly expressed, and nothing then remains but to give the intent effect." Cooley, Tax'n (2d ed.), 264. We fully approve the above rule of construction. It is contended by respondent, that a statute almost identical with ours has been construed by the Supreme Court of the United States in *Railway Co. v. Cheyenne*, 113 U. S. 516. If such was the case, we would follow the construction placed upon it by that court implicitly. After a careful examination of that case, we do not so understand it. There the Territorial board of equalization had assessed the right of way, as it was clearly their duty to do; but the city authorities, disregarding such assessment, sought, by virtue of their corporate power, to assess the same property; and the question there litigated was as to which assessment was correct. The court there holds in favor of the assessment by the Territorial board of equalization. We do not understand that the question in the suit at bar was litigated in that case. We presume that all of the machine-shops and other buildings there assessed were upon the right of way; otherwise, the Territorial board would not have assessed them. The respondent contends, however, that notwithstanding the property described in the complaint herein is not upon any of the lands obtained by congressional grant, and is more than one hundred feet from the centre line of said road, yet, because said machine-shops, repair-shops, etc., are connected with the main track of their road by switches and side-tracks, therefore the land upon which they stand all becomes right of way, and should be assessed as such, and, in

Construction of
the statute.
Authorities.

support of this claim, cites us to *Keener v. Railway Co.*, 31 Fed. Rep. 126; *Pfaff v. Railway Co.*, 29 Amer. & Eng. R. Cas. 181; *Railway Co. v. Goar*, Id. 189. In the first case the court says, "The term 'right of way' has a twofold signification. It sometimes is used to mean the mere intangible right to cross, — a right of crossing, a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its road-bed." They there only determine how it is used in their statute, and how the term is to be construed under the facts in that case. In the last two cases cited, the courts hold, in substance, that, under the revenue laws of their respective States, the term "railroad track" includes lands occupied by a railroad company with its main track, side-tracks, depot, round-houses, coal-sheds, and water-tanks. The reason for so holding is because they are so designated by their statutes. Hence they give us no light, except, perhaps, to impress upon our minds the necessity of looking to our own statutes to ascertain the true legislative intent. If the position taken by respondent is correct, then, as a sequence therefrom, we must give no force or effect to that portion of the legislative enactment which provides that the Territorial board shall not assess any machine or repair shops not situate on said right of way, but that it shall be the duty of the assessor to assess the same, unless we further find that the Legislature presumed that the railroad company would have machine and repair shops which would not be connected with the main track by some kind of a railroad track. It is our duty to give force and effect to all parts of the enactment, where we can. It follows, we think, that the Legislature intended that where the railroad owned machine and repair shops, or other buildings, not situate on that strip of land designated by the act of Congress as a right of way, or where they owned other grounds than the right of way, the assessor should assess the same, and that it should not be assessed by the Territorial board. Of course, if the railroad company had obtained the strip of land two hundred feet wide, or less, for constructing its main line or buildings thereon, through private property, it would still be "right of way," and assessed, with buildings thereon, by the Territorial board. We do not think that the Legislature expected the railroad company to have machine-shops and repair-shops without having a track to connect the same with the main line; and when they enacted that the Territorial board "shall not assess the value of any machine-shop or repair-shop or other buildings not situate on said right of way or grounds or other real estate of any corporation or company within this territory, but it shall be the duty of the

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assessor of the county, city, or district in which said machine or repair shops, or other buildings or grounds or other real estate, is situated, to assess the same," their intent seems plain, and that, under the facts of this case, we must therefore hold it was the duty of this appellant to assess the property in controversy. It has thus been ably argued that it would be better that the Territorial board should assess all railroad property. Conceding such to be the case, that argument should be addressed to the Legislature rather than the court; for it is not our province to pass upon the wisdom of the enactment, but rather to give effect to the legislative intent.

For the reasons before given, we think the judgment of the District Court should be reversed. It is so ordered.

Buck and Broderick, JJ., concurring.

See *Peoria, D. & E. R. Co. v. Goar*, and note, 29 Am. & Eng. R. R. Cas. 189; *Pfaff v. Terre Haute, etc., R. Co.*, 29 Ib. 181.

Iowa Statute requiring Assessment of Railroad Bridges over Mississippi and Missouri Rivers by Township Assessor not Unconstitutional. — In *Missouri, etc., R. Co. v. Harrison Co. (Iowa)*, 37 N. W. Rep. 372, Code Iowa, sect. 808, providing that railway bridges over the Mississippi and Missouri Rivers shall be assessable by the township assessor, it was held not contrary to the constitutional provision requiring that "all laws of a general nature shall have a uniform operation," as under it all citizens are placed on the same plane; and this is the case though under sects. 1317-1319 other railway property is assessable by the executive council.

Taxation of Rolling Stock of Foreign Corporation. — **Virginia Statute.** — In *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117, it was held that Acts Gen. Assem. Va. 1881-82, sect. 20, chap. 119, providing for taxation of the rolling stock of "every railroad company not exempted from taxation by virtue of its charter," is, by its terms, inapplicable to the rolling stock of a foreign corporation, which is used on its leased railways within the State, and owned by home corporations not exempt.

Justice Mathews said, "It is not denied, as it cannot be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore & Ohio Railroad Company is in the State of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ, a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion

that might, at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered, in particular instances, with reference to its operation as a regulation of commerce among the States; but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid. No question on that account arises in this case. But, looking at the statute under which the proceeding in question has been taken for the taxation of this property, we think it quite clear that it has no application to the rolling stock owned by the Baltimore & Ohio Railroad Company employed by it, in the manner described, in the operation of other railroads in Virginia. The terms of the Act, indeed, include 'every railroad and canal company not exempted from taxation by virtue of its charter;' but that language, according to a general rule of interpretation, must be confined to corporations deriving their authority from the laws of Virginia. It is apparent, also, from the other expressions contained in the law, as well as its whole purview, that it was intended to apply only to such domestic corporations as, in the case of railroad companies, were the owners of railroads, and the property usually appurtenant thereto, lying and being within the State. According to the description of the Act, the railroad company is supposed to own a roadway and track, depots and depot grounds, station buildings and fixtures, and machine-shops, together with real estate, rolling stock, and telegraph lines. Every such company is required to report its gross and net receipts; and a specific provision is made, that, if its road is only in part within the Commonwealth, the report shall show what part is so, and what proportion the same bears to its entire length, apportioning the receipts accordingly. In case of a failure of the company to make such a report, or to pay the tax assessed upon its property, it is provided that it shall be immediately assessed, under the direction of the auditor of public accounts, by some person appointed by him for that purpose, rating its real estate and rolling stock at twenty thousand dollars per mile, on which a tax shall be levied at the annual rate levied upon the value of other property for the year. None of these provisions are applicable to the case of the Baltimore & Ohio Railroad Company in respect to its ownership of the rolling stock in question."

In Pennsylvania, Public Works of a Railroad are not Taxable as Real Estate. — In *Northumberland Co. v. Philadelphia & E. R. Co.*, 8 Cent. Rep. (Pa.) 531, it was held that the public works of a railroad corporation, used as such, with their necessary appurtenances, are not, in the absence of legislation specially imposing such liability, liable to taxation as real estate under the general laws of the State.

Length of Road in Proportion to which the Sum it is to pay in Lieu of Taxes is to be determined is Length of Main Line only. — Act Del. 1873 (Rev. Code, p. 44) provides that the Philadelphia, Wilmington, & Baltimore Railroad Company shall pay annually the sum of \$40,000 in lieu of all taxes. At that time the company was the owner of a road 23.60 miles long in the State. By Act Leg. 1879 the company added two branch roads to its line 11.40 miles in length. Act March 1, 1881 (volume 16, Laws, 526), provides that, whenever the Delaware & Western Railroad Company shall become a part of a main trunk line, they shall pay as a State tax a sum bearing the same proportion to \$40,000 that the length of their line did to the length of the Philadelphia, Wilmington, & Baltimore Railroad Company. The length of the Delaware & Western Railroad, when united with a trunk line, was $21\frac{8}{10}$ miles. *Held*, that in computing the length of the Philadelphia, Wilmington, & Baltimore Railroad, the branch lines are not to be considered, and the Baltimore & Philadelphia Railroad Company, successor to the Delaware & Western Railroad, must pay a tax bearing the same proportion to \$40,000 that its line of 21.30 miles does to the 23.60 miles of the Philadelphia, Wilmington, & Baltimore Railroad. *Herbert v. Baltimore & P. R. Co.* (Del.), 13 Atlantic Rep. 902.

OLD COLONY R. Co.

v.

TRIPP.

(Massachusetts Supreme Judicial Court, June 1, 1888.)

Use of Passenger Station. — Baggage-Expressmen. — Discrimination. — Under Pub. St. Mass. c. 112, sect. 188, which reads as follows, "Every railroad corporation shall give to all persons or railroad companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and of the use of its depot and other buildings and grounds, and at any point where its railroad connects with another railroad reasonable and equal terms and facilities of interchange," *held*, that a railroad company may allow one local carrier of passengers and their luggage to come upon its premises for the purpose of soliciting the patronage of incoming passengers, and exclude all other persons engaged in the same business; that such carriers have no relation with a railroad company as common carriers; and furthermore, that an action of tort for trespass lies against persons entering without permission upon the grounds of such company for the purposes aforesaid.

ON report. Judgment on the verdict. Action in tort for trespass, tried in Superior Court. Thompson, J., ordered a verdict for the plaintiff for nominal damages, and reported the case to the Supreme Judicial Court.

The facts sufficiently appear in the opinion.

J. H. Benton, Jr., and C. W. Sumner, for plaintiff.

J. M. & T. C. Day and Hosea Kingman for defendant.

W. ALLEN, J. — Whatever implied license the defendant may have had to enter the plaintiff's close had been revoked by the regulations made by the plaintiff for the management of its business and the use of its property in its business. The defendant entered under a claim of right, and can justify his entry only by showing a right superior to that of the plaintiff. The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. As concerns the case at bar, the plaintiff is obliged to be a common carrier of passengers; it is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provided its depot for the use

Duty of plaintiff as to its depot.

of persons who were transported on its cars to or from the station, and holds it for that use ; and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is held. It can subject the use to rules and regulations ; but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them. See Pub. Stat. chap. 112, sect. 188 ; *Fitchburg R. Co. v. Gage*, 12 Gray, 393 ; *Spofford v. Boston & M. R. Co.*, 128 Mass. 326. The station was a passenger station. Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it.

The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station where his transit ends. What conveniences shall be furnished to passengers within the station for that purpose is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger, which will give him relations with the plaintiff which will involve the right to use the depot, does not establish such relations or such right ; and the right of passengers to be solicited by drivers of hacks and job-wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all ; and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such.

Rights of
defendant as
to depot.

The only case we have seen which seems to lend any counte-

nance to the position that a railroad company has no right to exclude persons from occupying its depots for the purpose of soliciting the patronage of passengers, is **Markham v. Brown examined.** *Markham v. Brown*, 8 N. H. 523, in which it was held that an innholder had no right to exclude from his inn a stage-driver who entered to solicit guests to patronize his stage in opposition to a driver of a rival line who had been admitted for a like purpose. It was said to rest upon the right of the passengers rather than that of the driver. However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of a right in the premises as will give to carriers of baggage, soliciting their patronage, an implied license to enter, irrevocably by the railroad company. *Barney v. Oyster Bay H. Steamboat Co.*, 67 N. Y. 301, and *Jencks v. Coleman*, 2 Sumn. 221, are cases directly in point. See also *Com. v. Power*, 7 Met. 496, and *Harris v. Stevens*, 31 Vt. 79.

It is argued that the statute gave to the defendant the same right to enter upon and use the buildings and platforms of the plaintiff which the plaintiff gave to Porter & Sons. **Rights of defendant under statute.** The plaintiff made a contract with Porter & Sons to do all the service required by incoming passengers, in receiving from the plaintiff, and delivering in the town, baggage and merchandise brought by them, and prohibited the defendant and all other owners of job-wagons from entering the station for the purpose of soliciting from passengers the carriage of their baggage and merchandise, but allowed them to enter for the purpose of delivering baggage or merchandise, or of receiving any for which they had orders. The statute, Pub. Stat. chap. 112, sect. 188, is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its railroad, and for the use of its depots and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." A penalty is prescribed in sect. 191 for violations of the statute. The statute, in providing that railroad corporations shall give to all persons equal facilities for the use of its depot, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads as common carriers and their patrons. It does not enact that a license given by a railroad company to a

stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depot, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressmen to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depot for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job-wagon, is a common carrier, gives him no special right under the statute: it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them.

The English Railway & Canal Traffic Act, 17 & 18 Vict. chap. 31, requires every railway and canal company to afford all reasonable facilities for traffic, and provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever." English statute and cases. *Marriott v. London & S. W. R. Co.*, 1 C. B. N. S. 499, was under this statute. The complaint was, that the omnibus of Marriott, in which he brought passengers to the railroad, was excluded by the railway company from its station grounds, when other omnibuses which brought passengers were admitted. An injunction was ordered. *Beadell v. Eastern Counties R. Co.*, 2 C. B. N. S. 509, was a complaint, under the statute, that the railway company refused to allow the complainant to ply for passengers at its station, it having granted the exclusive right of taking up passengers within the station to one Clark. The respondent allowed the complainant's cabs to enter the station for the purpose of putting down passengers, and then required him to leave the yard. An injunction was refused. One ground on which the case was distinguished from Marriott's is, that the complainant was allowed to enter the yard to set down passengers, and was only prohibited from remaining to ply for passengers. See also *Painter v. London, B. & S. C. R. Co.*, 2 C. B. N. S. 702; *Barker v. Midland R. Co.*, 18 C. B. 46. Besides Marriott's Case, *supra*, *Palmer v. London, B. & S. C. R. Co.*, L. R. 6 C. P. 194, and *Parkinson v. Great Western R. Co.*, L. R. 6 C. P. 554, are cases in which numerous injunctions were granted under the statute: in the former case, for refusing to admit to the station-yard vans containing goods for delivery to the railway company for transportation by it; in the latter case, for refusing to deliver at the station, to a carrier authorized to receive them, goods which had been transported on the railroad.

We have not been referred to any decision or dictum, in

England or in this country, that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers, or that a regulation of the company which allows such use by particular persons, and denies it to others, violates any right of the latter. Cases at common law or under statutes to determine whether railroad companies in particular instances gave equal terms and facilities to different parties to whom they furnished transportation, and with whom they dealt as common carriers, have no bearing on the case at bar. The defendant, in his business of solicitor of the patronage of passengers, held no relations with the plaintiff as a common carrier, and had no right to use its station grounds and buildings.

A majority of the court are of the opinion that there should be judgment on the verdict.

FIELD, J., dissenting. — The chief justice, Mr. Justice Devens, and myself think that our statutes should receive a different construction from that given to them by a majority of the court. Pub. Stat. chap. 112, sect. 188, provides that “every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange.” Sect. 189 of the same chapter provides that “every railroad corporation shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the directions contained thereon or accompanying the same; and shall not receive and forward over its road merchandise consigned, ordered, or expressly directed to be received and forwarded, by a different route.” By sect. 191, *ibid.*, a railroad corporation which violates these provisions is liable for all damages sustained by reason of such violation, and to a penalty of \$200, which may be recovered to the use of the party aggrieved or to the use of the Commonwealth.

These sections are taken from Stat. 1874, chap. 372, sects. 138, 139, 141; and Stat. 1880, chap. 258. Pub. Stat. chap. 112, sect. 188, was first enacted by Stat. 1867, chap. 339.

This section does not, in terms, require that the persons or companies to which the corporation is required to give “reasonable and equal terms, facilities, and accommodations,” shall own

the merchandise which is transported, nor is it limited to the delivery of merchandise to be transported by the railroad corporation. In the clause relating to connecting railroads, the section plainly means that railroads shall give to other railroads connecting with them, and shall receive from such other railroads, reasonable and equal terms and facilities of interchange, both in delivering passengers and merchandise to, and in receiving them from, the railroads with which they connect.

The provision that every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the use of the depot and other buildings and grounds, must include the use of the depot and other buildings and grounds for receiving passengers and merchandise from a railroad at the terminus where the transportation on the railroad

Statute refers to depot and ground for receiving passengers.

ends, as well as for delivering passengers and merchandise to a railroad at the terminus where such transportation begins. As the last clause of the section makes provision for carriers connecting by railroad, we think that the preceding clause was intended to make provision for other connecting carriers, and to include public or common carriers as well as private carriers actually employed by passengers or by the owners or consignees of merchandise: Stages and expresses are the only common carriers of passengers and of merchandise to and from many places in the Commonwealth, and, in connection with railroads, often form a continuous line of transportation. The statute, we think, was intended to prevent unjust discrimination by a railroad corporation between common carriers connected with it in any manner, and to require that the railroad corporations should furnish to such carriers reasonable and equal terms, facilities, and accommodations in the use of its depot and other buildings and grounds for the interchange of traffic.

A railroad corporation can make reasonable rules and regulations concerning the use of its depot and other buildings and grounds, and can exclude all persons therefrom who have no business with the railroad; and it can probably prohibit all persons from soliciting business for themselves on its premises. Whatever may be its right to exclude all common carriers of passengers or of merchandise from its depot and grounds who have not an order to enter, given by persons who are, or who intend to become, passengers, or who own or are entitled to the possession of merchandise which has been or is to be transported, it cannot arbitrarily admit to its depot and grounds one common carrier, and exclude all others. The effect of such a regulation would be to enable a railroad corporation largely to control the transportation of

Company cannot admit one carrier and exclude others.

passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public. Such a regulation does not give "to all persons or companies reasonable and equal terms, facilities, and accommodations . . . for the use of its depot and other buildings and grounds," in the transportation of persons and property. See *Parkinson v. Great Western R. Co.*, L. R. 6 C. P. 554; *Palmer v. London, B. & S. C. R. Co.*, Id. 194; *New England Express Co. v. Maine Central R. Co.*, 57 Me. 188.

English cases and statute examined. *Marriott v. London & S. W. R. Co.*, 1 C. B. N. S. 499, was an application for an injunction under Stat. 17 & 18 Vict. chap. 31, sect. 2; and an injunction was issued compelling the company to admit the complainant's omnibuses into its yard "at all reasonable times, for the purpose of forwarding, receiving, and delivering traffic upon and from its said railway, and in the same manner, and to the same extent, as other public vehicles of a similar description are admitted into the said yard for that purpose." In that case the company had made arrangements with one Williams to provide sufficient accommodations, by means of omnibuses, for passengers over a part of the route on which the complainant's omnibuses ran; but it appears that there were passengers from Twickenham and Hamptonwick whose sole reliance was upon the complainant's omnibuses. Williams's omnibuses were admitted within the yard, to set down and to receive passengers, but the complainant's omnibuses were not permitted to enter the yard for either purpose. The court held, that, as it did not appear that there was any public benefit which justified the course pursued by the company, the arrangement with Williams was an "undue and unreasonable preference and advantage" in his favor, within the meaning of the statute.

Beadell v. Eastern Counties R. Co., 2 C. B. N. S. 509, and *Painter v. London, B. & S. C. R. Co.*, 2 C. B. N. S. 702, were both applications under the same statute. In one of these cases the railway company had agreed with a cab proprietor, in consideration of six hundred pounds, to allow him the exclusive liberty of plying for hire within its station; and in the other, similar exclusive privileges had been granted to a limited number of cab proprietors. The application of a cab proprietor to be admitted on equal terms was refused in each case, on the ground that it was not shown that the arrangement made by the companies was not beneficial to the public; and it was said that "the statute in question was passed for the benefit of the public, and not for that of individuals." The later English cases we have cited seem to show, that, under the English statute, the public

convenience or inconvenience is not exclusively the test, but is only one element to be taken into account in considering what is an undue and unreasonable preference, and that a common carrier may be regarded as representing all those persons who choose to employ him.

While the English statute provides against undue and unreasonable preferences and advantages, it does not, in terms, provide that all persons and companies shall have reasonable and equal terms, facilities, and accommodations for the use of the depot and other buildings and grounds of a railroad corporation. The statute relating to expressmen, construed in *New England Express Co. v. Maine Central R. Co.*, 57 Me. 188, is in this respect similar in terms to Pub. Stat. chap. 112, sect. 188.

It is undoubtedly a convenience to passengers on a railroad that common carriers of passengers, or of baggage and other merchandise, should be in waiting on the arrival of trains at a station, although no order requiring the attendance of such carriers has been previously given.

While the statute requiring a railroad corporation to give to all persons and companies reasonable and equal terms, facilities, and accommodations for the use of its depot and other buildings and grounds, must, from the nature of the subject, be so construed as to permit the corporation to make such reasonable regulations as are necessary to enable it to perform, without inconvenience, its duties as a common carrier, and as the size and condition of its depot and other buildings and grounds require, yet the facts stated in the report cannot be held sufficient to warrant the plaintiff in admitting one company of expressmen to, and in excluding all others from, the advantages of bringing express-wagons within its grounds, and of accepting or of soliciting employment as a common carrier of baggage from the passengers arriving at its depot. The report does not show that any inconvenience to the railroad company, or to the public using the railroad, was occasioned by the defendant entering the grounds of the company for the purpose of soliciting employment of a common carrier of baggage. Upon the facts, as they appear in the report, it cannot be said, that, within any reasonable construction of the statute, reasonable and equal facilities were granted to the defendant and to A. S. Porter & Sons, or that any necessity existed for giving a preference to the latter.

In *Hole v. Digby*, 27 Week. Rep. 884, it was held, that, if a railway company licensed one person to ply with carriages within its station yard, a person not so licensed commits a trespass in entering the yard against the prohibition of the company, although the license given was an undue preference within the

meaning of Stat. 17 & 18 Vict. chap. 31, sect. 2. See *Barker v. Midland R. Co.*, 18 C. B. 46.

That statute authorized an application to the Court of Common Pleas, or to a judge of that court, by any person complaining of a violation of the Act, and authorized the court or judge to issue a writ of injunction restraining the company from continuing to violate the Act; and, in case of disobedience by the company, authorized the court or judge to issue a writ of attachment, and to direct the payment of a sum of money not exceeding two hundred dollars for every day during which, after a day to be named, the company failed to obey the injunction; and by sect. 6 it was provided that "no proceeding shall be taken for any violation or contravention of the above enactment, except in the manner provided," saving, however, all rights under existing laws. By Stat. 36 & 37 Vict. chap. 48, sect. 6, the jurisdiction given to the Court of Common Pleas was transferred to railway commissioners.

The remedies provided by our Statutes (Public Stat. chaps. 112, 191) are an action for damages, and also an action of tort for a penalty, which may be recovered by the party aggrieved to his own use. If, then, the railroad company, upon the facts appearing in the report, had no right absolutely to exclude the defendant, as a common carrier, from entering its depot and grounds to solicit employment from passengers, while it permitted A. S. Porter & Sons to enter for this purpose, and if it would be liable to the defendant in an action for excluding him, the defendant could not be guilty of a tort in entering for this purpose in a reasonable manner and at reasonable times.

Rules and Regulations by Railroad Companies generally. — A railroad company, both as the owner and proprietor of the houses and buildings connected with its road and as a carrier of passengers, has authority to make reasonable and suitable rules and regulations in regard to passengers intending to pass and repass on its road, in its passenger-cars, and in regard to all other persons having business with it. *Com. v. Power*, 7 Met. 600; s. c., 41 Am. Dec. 472.

Rules must be Reasonable. — All rules must, of course, be reasonable, and must be enforced in a reasonable manner. *State v. Overton*, 24 N. J. L. 435; *Chicago, etc., R. R. Co. v. Williams*, 55 Ill. 185; *Donovan v. Tex. & Pac. R. Co.*, 29 Am. & Eng. R. R. Cas. 320.

Determination as to Reasonableness. — The decisions do not agree as to whether the court or the jury shall determine as to whether or not a certain rule is reasonable.

It has been held in some cases that the reasonableness of regulations other than by-laws is a question of fact for the jury. *State v. Overton*, 24 N. J. L. 435; *State v. Charin*, 7 Iowa, 204, and cases cited therein.

In other cases it has been held that such question is for the court. Ill., etc., *R. R. Co. v. Whittemore*, 43 Ill. 420; *Vedder v. Fellows*, 20 N. Y. 126; *Tracy v. N. Y. & H. R. R. Co.*, 9 Bos. 396; *Hoffbauer v. Delhi, etc., R. R. Co.*, 52 Ia. 342; *Louisville & Nashville R. R. Co. v. Fleming*, 18 Am. & Eng. R. R. Cas. 347.

"The better opinion is, however, that the question is generally a mixed one of law and fact." 1 Redf. on Railw. 95; *Thomp. on Car.* 335; *Day v. Owen*, 5 Mich. 520; *Bass v. Chicago, etc., R. R. Co.*, 36 Wis. 450; *Brown v. Memphis, etc., R. R. Co.*, 4 Fed. Rep. 37.

"So far as the reasonableness of the rule in controversy depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury; but if the facts are undisputed, the question is a proper one for the court to determine. Keeping this distinction in view, the cases on this subject may perhaps be reconciled without difficulty." *Com. v. Power*, 41 Am. Dec. 472, note, and cases cited therein.

And see in this connection *Thomp. on Carriers*, 335; *Jencks v. Coleman*, 2 Sumn. 221; *Merrihew v. Milwaukee, etc., R. R. Co.*, 5 Am. Law. Reg. 364; *Chicago, etc., R. R. Co. v. Williams*, 55 Ill. 185; *State v. Charin*, 7 Ia. 204; *Day v. Owen*, 5 Mich. 520; *People v. Gillson*, 3 Park, Cr. 234; *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 21; *Houston, etc., R. R. Co. v. Moore*, 49 Tex. 31; *Stephen v. Smith*, 29 Ib. 160; *Gleason v. Goodrich I. Co.*, 32 Wis. 85; *Williams v. Great Western Ry. Co.*, 10 Ex. 15. But see 1 Redf. on Railw. 92, note.

But, of course, no rule can be made which infringes the rights of a patron of the road; and, furthermore, a rule to be valid must be general and permanent in its nature, and not made for a particular occasion or emergency. *Day v. Owen*, 5 Mich. 520.

And it is clear that the occasional non-enforcement of a rule does not abrogate it so as to prevent its enforcement in other cases. *Chicago, etc., R. R. Co. v. Williams*, 55 Ill. 185; *Bass v. Chicago, etc., R. R. Co.*, 36 Wis. 450.

Delegation of Power of Enforcement. — Station Agent. — It is also well settled that "the power which the company thus has to regulate its several depots may be delegated to suitable officers; . . . and where it has appointed a superintendent with authority, by himself and his assistants, to have charge of the depot, and manage its concerns, it is incident to his authority to exclude, or direct the exclusion of, persons who persist in violating the reasonable regulations prescribed, and thereby interrupt the officers and servants of the company in the discharge of their respective duties, or annoy passengers." *Com. v. Power*, 7 Met. 602; 1 Redfield on Railways, 88.

Hotel Runners. — When holding Ticket. — And where the facts were as follows, Certain innkeepers had been in the habit of sending their servants to the platform of a depot to solicit the patronage of passengers arriving in the cars; it had become a great annoyance, in consequence of which the station agent addressed a circular letter to said innkeepers, requesting them to discontinue the practice. All did so but the complainant, who was after a time forbidden to enter the depot; this he ignored, and was finally removed therefrom upon one occasion by force, — it was held that the fact of his having at the time a ticket in his pocket for a station on the road, procured for him by a third person, cut no figure whatever; the station agent and his employees being ignorant that such was the case. *Com. v. Power*, 7 Met. 604; and see *Harris v. Stevens et al.*, 31 Ib. 79.

Express-Agent. — Waiver at Regulations. — In a New York case it was held that the removal from a boat of an express-agent was justifiable where he persisted in soliciting business against the remonstrance of the carrier, although he had obtained a ticket for the passage; and furthermore, that, while a common carrier is not bound to permit a business which interferes with his own interests to be transacted on his vehicles, his waiver of his rights in regard to one person does not obligate him to waive them as to another. *The D. R. Martin*, 11 Blatch. 233. And see *Barney v. O., B. & H. Steamboat Co.*, 67 N. Y. 301. And in another and similar case in the same State, where the plaintiff, who was the known agent of the *Tremont* line of stage-coaches, knew that the proprietors of the steamboat "Benjamin Franklin" had entered

into a contract with the *Citizens'* Stage-Coach Company, to carry passengers between Boston and Providence, in connection with and to meet the steamboat, notwithstanding which he was in the habit of coming on board the steamer at Providence and Newport for the purpose of soliciting passengers for the Tremont line, it was held, that if the jury was of the opinion that such contract was reasonable and *bona fide*, and not entered into for the purpose of an oppressive monopoly, the exclusion of the plaintiff from the boat in question was a reasonable regulation, and so the jury found. *Jencks v. Coleman*, 2 Sum. 221.

Conditions Imposed. — Undue Preference of Company's Agent. — But it was held in an English case, where a railway company permitted a carrier (who also acted as superintendent of its goods traffic) to hold himself out as its agent for the receipt of goods to be carried on its line, and his office as the receiving office of the company, and goods were received by him at that place, without requiring the senders to sign conditions which the company required all other carriers who brought goods to its station to sign, that such action was an undue preference, and could be enjoined. *Baxendale v. The Bristol & Exeter Ry. Co.*, 11 C. B. N. S. 787.

Use of Station. — Truckmen. — It was held in another English case that a railway company which employed agents to deliver goods in a large town to consignees, such agents being allowed to pack and arrange such goods upon vans within the station, could rightfully refuse the same privilege to other carriers, on the ground that "a thing may be very reasonable and proper to be done by the railway within its own premises, which it is not in the least degree bound to communicate to other people. *Pickford v. Caledonian Ry. Co.*, 4 Sess. Cas. 755.

Admission of Vans to Station Grounds. — And it was held, in still another English case where the facts were as follows: "A railway company refused to receive goods sent to their station by the public generally, after a quarter past five o'clock P.M., to be forwarded by the goods train which left such station on the same night; but they received goods for the same train brought there by their agent, "W.," as late as eight o'clock P.M. "W." had a receiving-office for goods about a mile from the station, where he weighed, classified, and prepared the same for loading, which would otherwise have had to be done at the station, and but for which having been so previously done, the same could not have generally been received at the station at so late an hour," that the admission of "W.'s" vans and the receipt of goods from him at a later hour than a quarter after five was an undue prejudice to others. *Garton v. Bristol & Exeter Ry. Co.*, 6 C. B. N. S. 639. And see *Baxendale v. London & South-western Ry. Co.*, 12 C. B. N. S. 758. Compare *Palmer v. same*, L. R. 1 C. P. 588, 35 L. J. C. P. 289. And see *same v. London, Brighton, & So. Coast Ry. Co.*, 68 L. R. C. P. 194, 40 L. J. C. P. 133.

Refusal to permit Omnibus Proprietors and Drivers in Station Yard. — In the case of *Barker v. The Midland Railway Company*, 18 C. B. 46, where an omnibus proprietor sought to compel a railway company to allow his vehicles to enter the yard of a certain station to set down passengers and solicit patronage, it was held that the action could not be maintained. As we have seen in the opinions of the judges in the principal case, it was held in the leading case, *Marriott v. The London & South-western Railway Company*, 1 C. B. N. S. 498, that, in the absence of special circumstances showing it to be reasonable, the granting of such exclusive privilege to an omnibus proprietor amounted to the granting of undue and unreasonable preferences, and that, on the other hand, it was laid down in another case frequently cited, *Beadell v. The Eastern Counties Railway Company*, 2 C. B. N. S. 509, that the railway company could not be enjoined at the instance of a rival, where no inconvenience to the public could be shown to have arisen from the arrangement; while in a still later case, *Painter v. The London, Brighton, and South Coast Railway Com-*

pany, 2 C. B. N. S. 702, the court held, the facts being similar to those of the last case, that such exclusive permission might be given, although it was sworn by the complainant, and by several other fly proprietors who were likewise excluded, that occasional delay and inconvenience resulted to the public from the course pursued. And in a Tennessee case, where the facts were as follows, — The defendant was a watchman with police powers at the Nashville & Chattanooga Railroad Depot in the city of Nashville. The company had a regulation forbidding hackmen, peddlers, expressmen, and loafers from coming within the depot building. Placards were posted in and about the depot announcing this fact; but the proof showed that it was a rule that a hackman who had a check for luggage of a passenger was allowed to enter the building to obtain the same, and that the prosecutor in this case, who was a hackman, had such a check, and exhibited it. The proof also showed that defendant found prosecutor in the depot, endeavoring to induce a passenger to take his hack for the Louisville depot, and that the defendant ordered him out of the building, and, on his refusal to go, forcibly ejected him therefrom, — it was *held*, that, if it was the right of the hackman under the regulations to go into the depot to obtain the luggage of a passenger whose check he had, then it could not be that he had forfeited the right, at the will of the watchman, as a penalty for departing from the strict line of his right by going into the sitting-room for passengers. In doing this he was liable to be ordered out of this unauthorized place, and, if necessary, ejected from it. But it does not follow, that, in the exercise of this right on the part of the watchman, he could go farther, and deprive the hackman of that which was his right; that is, to procure the luggage for which he had a check. *Summit v. The State*, 8 Lea (Tenn.), 413; s. c., 9 Am. & Eng. R. R. Cas. 302, and notes.

Particular Carrier. — Goods sent in Care of Delivery. — It has been held in England that a railroad company cannot be compelled to deliver goods arriving at its station to a particular cart-man to whose care they are addressed, under sect. 2 of the Railway Traffic Act (17 & 18 Vict. c. 31), which provides that "every railway company shall afford all reasonable facilities for the receiving and forwarding and delivering of traffic," and shall not "subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." *Wannan's Scottish Central Ry. Co.*, 1 Railway & Canal Traffic Cas. 237; and see *Menzies v. The Caledonian Ry. Co.*, 5 Ry. & Canal Traffic Cas. 306. Compare *Parkinson v. Gt. Wes. Ry. Co.*, L. R. 6 C. P. 544.

Depot and Grounds. — Implied License to enter. — Revocation of. — While it may be said with truth that companies, by opening their doors, give an implied license to all to enter their depots, such license is unquestionably revocable; and if actually revoked, and due notice given to an individual or class of individuals, and they still persist in entering, they may be excluded by force. *Com. v. Power*, 7 Met. 602; *Weaver v. Bush*, 8 J. R. 78.

Personal Injury. — Depot Platform. — Hackman. — It was held in a Maine case, where a hackman who was accustomed to carry passengers to and from a railroad depot was injured by a defect in its platform, he was entitled to recover, upon the ground that he was there by the license and permission of the railroad company; and that, considering the accommodation afforded by him to travellers, he might be looked upon as contributing to the business of the company. *Tobin v. Portland, Saco, & Portland R. R.*, 59 Me. 188; s. c., 8 Am. & Eng. Corp. Cas. 557, 8 Am. Rep. 415. It was observed by Appleton, C. J., in rendering his opinion in this case, that "the hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightly upon the same as the passengers alighting;" and that "it would be absurd to protect the one from the consequences of corporate negligence, and not the other." *Id.*

HEINLEIN

v.

BOSTON & PROVIDENCE R. CO.

(Massachusetts Supreme Judicial Court, May 7, 1888.)

Who is Passenger. — Defective Premises. — A person who enters a railway station intending to take a certain train, and finding it gone, waits in the station for a horse-car, is not a passenger, and the company is not under the duty as to him of keeping its premises safely lighted.

ON plaintiff's exceptions. Judgment on verdict.

Action of tort to recover damages for a personal injury alleged to have been caused by the defendant's negligence. The case was tried in the Superior Court before Bacon, J., and a jury. At the close of the evidence the court ruled that the plaintiff was not entitled to recover, and directed a verdict for the defendant, which was rendered accordingly; to which ruling, direction, and verdict the plaintiff excepted.

The facts and questions presented are sufficiently stated in the opinion.

John C. Coombs and *Nathaniel U. Walker* for plaintiff.

George Putnam and *Thomas Russell* for defendant.

DEVENS, J. — The plaintiff entered the waiting-room of defendant's station in Roxbury, intending to take the last train for Boston, for which a friend had informed him he was in time. In fact, it had been gone some fifteen minutes. With his friends the plaintiff remained "three minutes, or something like that," as he stated on cross-examination, or "about two minutes," as other witnesses stated, in conversation with them. The station agent was there, clearing up the station; but no inquiries were made of him or any one on the subject of the train. At the end of this time the plaintiff was informed by his friend that the last train to Boston had gone, and that he would have to take a horse-car. He waited "a minute or two," as he states in his examination-in-chief, or "three or four minutes," as he states in his cross-examination, in the plaintiff's station. He further testified, "I was waiting for a horse-car after I found the train had gone; I did not go there for a horse-car."

His brother — who was one of those who accompanied him — states that, after being informed that the only way the plaintiff

“could get in” to Boston “was to take horse-cars,” adds, “We thought we could wait in the depot until one came along.”

At the expiration of the time which the plaintiff had waited after being informed that the last train had gone, — whether it was “one or two” or whether it was “three or four minutes,” — he determined to leave the station. He then found that the door leading to the street, by which he had entered, was locked; and he crossed the waiting-room to go out by the door leading to the platform. At this time the lights in the ticket-office and waiting-room were extinguished, by which some light was thrown upon the door or steps leading to the platform, which platform was then lighted by an electric light, which left the door and steps in shadow. There was evidence that the plaintiff was injured by reason of the insufficient light on these steps. Whether there was sufficient evidence that he was in the exercise of due care as he stepped out towards the platform was in dispute.

It is the contention of the plaintiff that he was on the premises at the invitation of the defendant; and that the company was bound to see that its premises were in such condition, in all respects, that such a person in the exercise of ordinary care could leave them without injury; and that this extends to and embraces proper and suitable platforms and steps and walks, as well as suitable lights.

Defendant
under no duty
as to plaintiff.

The only obligation that the defendant could have been under to the plaintiff was that which it owed to one intending to become a passenger in one of its trains, who would have a right to use the waiting-room for a reasonable time before the arrival of the expected train, or to one who sought information as to the time of departure or arrival of trains in which he was interested. Admitting that, as to such persons, there was a duty such as is claimed by the plaintiff owing from the defendant, by reason of an implied invitation on its part to enter the waiting-room in which the ticket-office was situated, and without discussing whether, in view of the fact that there was to be no train such as he desired, and that he remained for two or three minutes without making any inquiry, the plaintiff could, up to the time that he was informed that there was no train such as he desired, be held to have the rights of an intending passenger or of a person seeking information, — we are of opinion that after that time he had no such rights, if he continued to remain in the station after he had full opportunity to leave it. While the defendant could, of course, do him no wanton injury, it had a right to conduct its business in the ordinary way, without regard to his comfort or convenience. When he arrived he found the station-master clearing up the station. The time for closing it had arrived, and, if the plaintiff saw fit to linger, the defendant's servants had a

right to proceed to close the station and extinguish the lights. There was ample time for him to have retired while the light in the waiting-room was burning. This room was not a place where every one might resort and use it for his own business ; and he could not expect that it or his way out would be kept lighted until the arrival of the horse-car for which, as he states, he waited. Whether, after he knew there was no railroad train for him, he is to be considered a trespasser or mere licensee, is not important. He could have no higher character than the latter. There was no allurements or inducement held out for him to remain ; and if he did so, it was at his own risk. In order that it be held that thereafter defendant owed any duty to him, it should be shown, not merely that it or its servant acquiesced in and permitted him to remain when his only possible business had been concluded, but that it was in accordance with their invitation or with the intention and design with which the waiting-room was prepared to be used. Of this there was no evidence.

The plaintiff urges that the inquiry should have been submitted to the jury, as a question of fact, whether he remained an unreasonable time or for an unauthorized purpose. On the plaintiff's own statement, three or four minutes elapsed before the light in the station was put out, and during this time he had remained for his own convenience. Upon these facts a verdict that he had remained only a reasonable time or for an authorized purpose would not have been justified. Nothing was shown to have been done wilfully or wantonly to the injury of the plaintiff, and upon these facts the presiding judge properly ruled that the plaintiff was not entitled to recover.

In this view of the case it is unnecessary to inquire whether there was sufficient evidence that plaintiff himself was in the exercise of due care in the manner in which he left the station.

Judgment on verdict.

Who is a Passenger. — See *Muehlhausen v. St. Louis, etc., R. Co.*, 28 Am. & Eng. R. R. Cas. 157 ; *McKimble v. Boston & M. R. Co.*, 4 Ib. 463 ; *McQueen v. Central Branch U. P. R. Co.*, and note, 15 Ib. 226-229 ; *Smith v. St. Paul City R. Co.*, 16 Ib. 310 ; *New York Central, etc., R. Co. v. Vick*, 17 Ib. 608 ; *Price v. Penn. R. Co.*, 18 Ib. 273 ; *Gardner v. New Haven, etc., R. Co.*, and note, 18 Ib. 170-176 ; *Sherman v. Hannibal & St. Jo. R. Co.*, 4 Ib. 589 ; *Duff v. Alleghany Valley R. Co.*, 2 Ib. 1 ; *Commonwealth v. Boston & M. R. Co.*, 1 Ib. 457 ; *Penn. R. Co. v. Price*, 1 Ib. 234.

REED

v.

RICHMOND & ALLEGHANY R. Co.

(Virginia Supreme Court of Appeals, Dec. 8, 1887.)

Injury to Passenger by falling off Platform. — Contributory Negligence. — It is not only negligence, but recklessness, for a passenger who is staying at a railway station, on a dark night, when the platform lamp has been temporarily removed, to go out on the platform and walk to the end of it; and if she falls off and is injured, there can be no recovery.

Receiver. — Leave to Sue. — A receiver as such cannot be sued elsewhere than in the court in which he was appointed, without leave of such court had and obtained; and whether leave to sue will be granted, rests in the discretion of the court. This rule is not affected by the constitutional right of citizens to sue in federal courts in certain cases.

APPEAL from Circuit Court of city of Richmond; B. R. WELLFORD, Jr., Judge.

This action was brought by Mrs. D. A. Reed against the Richmond & Alleghany Railroad Company, to recover compensation for injuries sustained by the plaintiff owing to a fall from a platform at one of the defendant's stations. The judgment of the court below was in the defendant's favor. The plaintiff appealed.

The appellant, a citizen of the State of Indiana, filed her petition in the court below, alleging that on the 22d of July, 1885, she took passage on one of the trains of the Richmond & Alleghany Railroad Company at the town of Lexington, intending to go to Bremo, a station on the same road; that upon the arrival of the train at Scottsville, which was about three o'clock in the morning of the next day, she left the train, intending to resume her journey for the point of destination a few hours thereafter; that, upon leaving the train at Scottsville, she proceeded to the reception-room for passengers in the depot building near by, it being then quite dark; that, a little while afterwards, she went out on the platform in front of the reception-room, and, there being no sufficient light to enable her to see her way, she fell from the platform to the ground, a distance of several feet, in consequence of which she sustained serious bodily injuries. It was also averred in the petition that all the franchises, property,

rights, etc., of said railroad company were in the hands of certain-named receivers, appointed by an order of the said court ; and accordingly the prayer of the petition was, that the petitioner be granted leave "to institute against the said receivers in any court of common law having jurisdiction of the subject, such action " as she might be advised to be proper for the recovery of such damages as she had sustained by reason of her fall as aforesaid. To this petition the receivers filed their answer, in which they denied liability on their part to the petitioner, alleging that their "duty to the petitioner was fully performed when she was safely carried to Scottsville, and safely put off the train ; that it was not their duty to provide accommodations for passengers to spend the night, and that it was negligence on the part of the petitioner to walk upon the platform in the darkness." "It is true," the answer went on to say, "that there was no railing around the platform ; and to have put one there, would have rendered it useless for the purposes for which it was built, namely, to transfer freight to and from the cars ; and, even if there was no light on the platform, that circumstance did not constitute a violation of duty on the part of these respondents, because it was not a time when a train was to arrive or depart, and it was not to be expected that passengers who had arrived would remain in the depot all night, as petitioner declared her intention to do, after an agent of these respondents had offered to conduct her to a hotel." Therefore, the answer concludes, the petitioner was herself guilty of negligence which caused the injuries complained of. Upon the filing of the answer, the court directed an issue to be tried on the law side of the court, to ascertain what damages, if any, the petitioner was entitled to recover. A jury was accordingly impanelled, and, having heard the evidence, returned a verdict for the petitioner for \$1,300 damages ; and thereupon the defendants moved the court to set aside the verdict, and for a new trial, but the motion was overruled. The court thereupon ordered that the verdict, and all the proceedings had upon the trial of the issue, be certified to the chancery side of the court ; and also that it be certified that, in the opinion of the court, the verdict was contrary to the law and the evidence, which was accordingly done ; after which the decree appealed from was entered, whereby the petition was dismissed, at the costs of the petitioner.

Edgar Allan, J. Samuel Parrish, James M. Donnan, and F. C. Moon for appellant.

Johnson, Williams & Boulware, and Christian & Christian for appellee.

LEWIS, P. — The first assignment of error is, that “the Circuit Court erred in refusing leave to the appellant to bring her action at common law in any court of competent jurisdiction, as she had the constitutional right (she being a citizen of the State of Indiana) to have her cause of action heard and determined in a federal court sitting in Virginia.” So far as the claim of a right to sue in a federal court is concerned, it may be remarked that no such right was specifically claimed in the court below; and, if it had been, the result would have been the same. For there is no better-settled proposition than that a receiver, as such, cannot be sued elsewhere than in the court by which he was appointed, without the leave of such court first had and obtained; and whether leave to sue will be granted, rests in the discretion of the court. This principle has been nowhere more emphatically asserted than by the Supreme Court of the United States in a number of cases, and by this court in the recent case of *Melendy v. Barbour*, 78 Va. 544; s. c., 25 Am. & Eng. R. R. Cas. 622. Indeed, such leave is essential to the *jurisdiction* of any other court, State or federal, in such a case. *Peale v. Phipps*, 14 How. 368; *Barton v. Barbour*, 104 U. S. 126; s. c., 4 Am. & Eng. R. R. Cas. 1. The doctrine, and the reasons upon which it rests, are so fully and clearly laid down in the cases just mentioned, that we deem it unnecessary, in this connection, to do more than simply to refer to those cases. They are decisive of the question here raised, and hence the first assignment of error is not well taken.

Suit against
receiver.
Right to sue in
federal court.

The second, third, and fourth assignments of error relate to certain instructions, some of which were given and others refused, upon the trial of the issue, and will be considered together. The first and second of these instructions were offered by the appellant, and were refused, and are as follows: “(1) The court instructs the jury that if they shall believe, from the evidence, that the plaintiff, being a passenger on the line of the defendant company, was left by the agents and servants of said company, in the night-time, in their waiting-room for passengers at Scottsville, and shall further believe that such waiting-room was not lighted so as to show the dangers, if any, of walking upon the platform in front of said waiting-room, then the failure to have the same so lighted was such negligence on the part of the defendant company as to render them liable in this issue. (2) The court further instructs the jury, that, in considering the question of negligence, they may take into consideration all the facts in regard to the accommodations provided for the reception and necessary comfort of female passengers in the waiting-room at Scottsville, and may also consider whether having a railing on the platform in front of

Instructions
considered.

said waiting-room would in any way have interfered with the freight business of the defendant company." In respect to the first of these instructions, it is sufficient to say that it is open to the obvious objection that it makes no qualification for possible contributory negligence on the part of the plaintiff, and was therefore rightly refused; and the second was also properly refused, if for no other reason than that it is vague, and was calculated rather to confuse than to enlighten the jury upon the issues they were sworn to try. On the other hand, the instruction given by the court, and objected to by the appellant, correctly propounds the law, and was rightly given. It is in these words: "The jury should find for the defendant unless they believe from all the evidence that the accommodations provided by the defendants for passengers arriving at Scottsville, of ordinary intelligence and prudence, were unsafe, or that, on the night of the accident to the plaintiff, the defendant's agents were negligent in properly lighting the premises, and shall further believe that the plaintiff did not contribute to the accident by her own negligence, or want of such care and caution as a reasonably prudent person should have exercised for his own protection."

This brings us to the consideration of the last and principal assignment of error, which is, that the Circuit Court erred in setting aside the verdict of the jury, or, rather, in disregarding it, and in dismissing the petition. And here it may be well to remark, before commenting upon the evidence, which is made part of the record, that a verdict rendered upon the trial of an issue out of chancery stands upon a very different footing from a verdict rendered upon an issue *devisavit vel non*, or in an action at common law; the reason being, that in the former case the issue is a mere incident in the proceedings, intended to satisfy the conscience of the chancellor, who may therefore approve the verdict, or disregard it altogether, according to what, in his judgment, the law and the evidence in the particular case require. This is a familiar principle, repeatedly recognized by this court. *Powell v. Manson*, 22 Grat. 177; *Lamberts v. Cooper*, 29 Grat. 61; *Snouffer's Adm'r v. Hansbrough*, 79 Va. 166; *Fishburne v. Ferguson*, *ante*, 575 (decided at the present term). See also *Watt v. Starke*, 101 U. S. 247, which is an authority to show that a motion for a new trial of an issue out of chancery must be made to the Court of Chancery. And see, to the same effect, *Watkins v. Carlton*, 10 Leigh, 550; *Brockenbrough's Ex'rs v. Spindle*, 17 Grat. 21.

The action of the court, however, both as regards the awarding of an issue and the verdict when rendered, is reviewable on

Practice.
Direction of
issue out of
chancery.

appeal ; and the question here now is, whether, upon the evidence before the jury, the appellant is entitled to a decree in accordance with the verdict which was rendered in her favor. The evidence is brief, and, in our opinion, establishes a state of facts which fully sustains the action of the lower court ; in other words, it shows that the negligence of the appellant was the proximate cause of the injuries she received, and therefore that she is not entitled to recover. In her own deposition, she testifies, that, when she alighted from the train at Scottsville, the only light by which she was lighted to the waiting-room was the dim reflection from the passing train, and the light in the agent's office, not sufficient to expose the platform. Yet she necessarily ascended the steps to the platform, and crossed the platform, to get into the waiting-room. And upon the question of lights she is flatly contradicted by her own witness and travelling companion, Mrs. Clark, who testifies as follows : " Mrs. Reed [the appellant] and I were helped off the train by the conductor on the side next to the depot. He lighted us with his lantern into the waiting-room. There was one other light, which was just going out, and which the conductor took down and carried in when he showed us in. This light had been posted on the depot platform. There was a young man at the depot, whom the conductor told that the lamp ought to be trimmed, and he took it to trim it. There was a light in the depot besides." The same witness also testifies that a few minutes afterwards, and before the young man just mentioned had finished trimming the lamp, the appellant inquired of her if there was a ladies' toilet-room in the building, to which she answered she thought not ; whereupon the appellant went out on the platform, which was not lighted, and walked in the dark to the end of it, where she fell off the ground, a distance of several feet. The evidence also shows that the platform extended the whole length of the depot building, and that at the time of the accident so much of it as was immediately in front of the waiting-room door was lighted by the light in the room.

Evidence reviewed. Plaintiff held guilty of contributory negligence.

Such, substantially, is the evidence on this point for the appellant. The conductor of the train, who was examined as a witness for the defendant, testifies that, when the train reached Scottsville, he showed the ladies into the depot, and saw them seated ; that they determined to stop over at Scottsville, because he told them the train did not stop at Bremo, the station to which they wished to go. It appears that they were travelling on "a thousand-mile ticket," and it is not pretended that they were informed when or before they took passage at Lexington that it would stop at Bremo. It was an express-train, and did

not usually stop there. The conductor, however, testifies that just before getting to Scottsville, finding that the train would stop at Bremono, he notified the appellant and her companion of the fact, but that they adhered to their determination to stop over at Scottsville, and take the next train for Bremono, and accordingly stopped there. The next witness for the defendant, M. S. Bowles, an employee of the company at Scottsville, testifies that, after the ladies had been "lighted into the reception-room" by the conductor, he offered to show them to the hotel, a short distance from the depot; but that they declined to go, saying they preferred to remain in the reception-room until the arrival of the next train, which was to pass between daylight and sunrise; that a short while afterwards he heard a noise outside of the depot, and, going in that direction, he found the appellant lying unconscious on the ground at the end of the platform. The same witness also testifies "that freight taken from the depot into the cars is not passed across the platform, it not being on the side of the depot next to the track; but that it is necessary for and is constantly used in receiving freight from wagons, and delivering freight to wagons, though not at the door of the reception-room; that there was no railing around the platform, or any part of it, and, if there had been, it would have rendered the platform useless for the purpose for which it was designed; but that a railing in front of the reception-room would not have been in the way."

We have thus gone over the evidence chiefly relied upon as showing negligence on either side; and it shows, we think, that upon no just principle can the decree appealed from be reversed. The law undoubtedly imposes upon a railroad company the duty of keeping its stations and premises in such safe condition as that its passengers, in the exercise of ordinary care, can get upon or leave the same, or go wherever they are expressly or impliedly invited to go thereon, without injury; and this embraces suitable steps and platforms, as well as suitable light. *Keefe v. Railroad Co.*, 142 Mass. 251; s. c., 27 Am. & Eng. R. R. Cas. 137; 2 Wood, Ry. Law, sect. 310, and cases cited. In the present case, however, the appellant has not exercised such care as entitles her to recover. The case as disclosed by the record is simply this: Upon her alighting at the station, she was shown by the light of a lamp up the steps of the platform, and into the reception-room, where a light was burning. The hour was late, and no other trains were to pass the station that night. After being shown into the reception-room, she declined the offer of an employee of the company to conduct her to a hotel near by, preferring, as she said, to spend the residue of the night at the depot; and, while the platform lamp was being trimmed, — presumably, from the

evidence, in her presence, — she walked out upon the platform, and, without taking the precaution to inquire or ascertain whether or not she could safely do so, turned at right angles upon stepping upon the platform from the lighted reception-room, and walked in the dark to *the end of it*, where she fell off, and was injured. This, all the circumstances considered, was not only negligence, but recklessness, on her part, which clearly defeats a recovery.

It was contended, in the argument, that she went out to obey a sudden and urgent call of nature, but of this there is no positive proof in the record; and, even if it were so, that could not affect her duty to take ordinary care in walking upon the platform or elsewhere upon the defendant's premises. It is unnecessary, therefore, to inquire whether or not it was the duty of the company to have provided a railing at the outer edge of the platform, or whether or not it has been negligent in any particular, since, upon the facts stated, we are of opinion that the verdict of the jury was plainly wrong, and that the decree must be affirmed. Richardson, J., absent.

Leave to sue Receivers. — See *Lyman v. Central Vt. R. Co.*, and note, 30 Am. & Eng. R. R. Cas. 210-222.

Injuries to Passengers caused by Defective Platforms and Station Appointments. — See generally *Alabama G. S. R. Co. v. Arnold*, and note, 30 Am. & Eng. R. R. Cas. 546-555; *Moses v. Louisville, N. O. & T. R. Co.*, 30 Ib. 556; *Laffin v. Buffalo & S. W. R. Co.*, and note, 30 Ib. 596-599; *Murray v. Silver City, D. & P. R. Co.*, and note, 26 Ib. 154-162; *Pennsylvania R. Co. v. Marion*, 27 Ib. 132; *Bemis v. Central Vermont R. Co.*, and note, 25 Ib. 138, 141; *Baltimore & O. R. Co. v. Rose*, and note, 27 Ib. 125, 130; *Beeson v. Chicago, etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 45; *Wheelwright v. Boston, etc., R. Co.*, 16 Ib. 315; *Illinois Cent. R. Co. v. Frelka*, 18 Ib. 7; *Rennecker v. South Car. R. Co.*, 18 Ib. 149; *Buenemann v. St. Paul, etc., R. Co.*, 18 Ib. 153; *Foss v. Chicago, etc., R. Co.*, 19 Ib. 112; *Watson v. Wabash, etc., R. Co.*, 19 Ib. 114; *Bennett v. L. & N. R. Co.*, 1 Ib. 71; *Stewart v. I. & C. N. R. Co.*, 2 Ib. 497; *Langan v. St. Louis, etc., R. Co.*, 3 Ib. 355; *Leary v. Cleveland, etc., R. Co.*, 3 Ib. 498; *Louisville, etc., R. Co. v. Wolff*, 5 Ib. 625; *St. Louis, etc., R. Co. v. Cantrell*, 8 Ib. 198; *People v. McKay*, 8 Ib. 205; *Johnson v. Chicago, etc., R. Co.*, 8 Ib. 206; *Dobiecke v. Sharpe*, 8 Ib. 485; *Balto. & O. R. Co. v. Schwindling*, 8 Ib. 544.

Passenger falling into Hole on Way from Depot may recover for Injuries received. — In *Cross v. Lake Shore, etc., R. Co. (Mich.)*, 37 N. W. Rep. 361, an action for personal injuries, it appeared that plaintiff on a dark and rainy night, after leaving defendant's depot, but while still on its grounds, fell into a hole, and permanently injured his ankle; that the hole was close to the culvert of a diagonal path, on which plaintiff was walking; that there were no lights, fence, or guard to warn or prevent passengers from falling into it; and that defendant had constructed another and safer way of exit from the depot, but most of the travel went over the way taken by plaintiff, and defendant's agents and employees used it, and never objected to its use by passengers. *Held*, that plaintiff was entitled to recover.

Morse, J., said, "I find no conflict in the evidence as to the following facts: *First*, The hole into which plaintiff fell was upon the station grounds of the defendant. *Second*, It was left entirely unguarded, by night or by day. *Third*,

The diagonal way was travelled by nearly all the people coming from or going to the depot. *Fourth*, No objection was ever made by the railroad company, or any of its agents, to its use. The employees of the defendant used it; and it was recognized as the most common way of all, and was by usage and implied permission, at least, one of the regular ways to and from the depot. The jury were undoubtedly correct in the finding of facts, and the court was right in his theory of the law. This diagonal walk being a recognized way to and from the depot, it was the duty of the defendant to keep it reasonably safe. 1 Ror. R. R. 476; Smith, Neg. (2d ed.) *126-*188; Cooley, Torts, 605; Delaney v. Railway, 33 Wis. 67; Hulbert v. Railroad, 40 N. Y. 145; Dillaye v. Railroad, 56 Barb. 30; Gaynor v. Railway Co., 100 Mass. 208; Tobin v. Railway Co., 59 Me. 183; Hoffman v. Railroad, 75 N. Y. 605; Cartwright v. Railway Co., 52 Mich. 606; s. c., 16 Am. & Eng. R. R. Cas. 321. The hole in question was near enough this diagonal walk, if the testimony on the part of the plaintiff was accepted by the jury, that a person travelling the same might, by making a false step, or by stumbling from the path, fall into it. In such case the defendant would be liable for the injury, if proper care was exercised by the plaintiff. Hardcastle v. Railway Co., 4 Hurl. & N. 67; Barnes v. Ward, 9 C. B. 392; Hadley v. Taylor, 1 L. R. C. P. 53; Cooley, Torts, 660; Wood, Nuis. sect. 271; 1 Add. Torts, sect. 282; Pickard v. Smith, 10 C. B. (N. S.) 470; Bishop v. Trustees, 1 El. & El. 697; Wilkinson v. Fairrie, 32 Law J. Exch. 73; Binks v. Railroad Co., 32 Law J. Q. B. 26; Hounsell v. Smyth, 29 Law J. C. P. 203; Wettor v. Dunk, 4 Fost. & F. 298; Indermauer v. Dames, L. R. 1 C. P. 274."

Cars projecting over Platform striking and injuring Passenger.—In an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff, as a passenger on the road of the N. Y. & N. E. R. R. Co., came into the depot at Hartford, Conn., which depot was built and used in common by that company and the defendant. There were exits from the depot on the east and west sides. Plaintiff, who had never before been in Hartford, followed a number of other passengers out of the depot onto a platform running along its east side. One of the defendant's tracks ran outside of the depot, along near the platform, so close that its cars moving thereon overlapped the platform two or three inches and more, according to the oscillations of the car. Cabmen were standing about ten feet from the platform, one of whom approached plaintiff, and was engaged by him. He took part of plaintiff's baggage and proceeded to his cab, a few feet distant, leaving plaintiff on the platform, when one of defendant's trains, moving at an unusually rapid rate upon the track over which the cabman had just passed, struck plaintiff, and inflicted the injury. It was a dark, hazy evening. Plaintiff did not know of the existence of the track, and did not see it. Both he and the cabman testified that they did not see the train or know of its approach, and heard no bell or whistle. *Held*, that the evidence justified a submission of the case to the jury, and was sufficient to sustain a verdict for plaintiff: that he was entitled to a safe passage out of the depot, and had a right to act upon the assumption that every necessary and reasonable precaution would be taken to make it safe; that he had a right to regard the platform as a safe and proper place; and that to bring, without notice, a train at such a speed up to a station and into the neighborhood of outgoing and incoming passengers, and so near a platform provided for them as to sweep a portion of it, was negligence. Archer v. New York, N. H. & H. R. Co., 106 N. Y. 589.

HEMMINGWAY

v.

CHICAGO, MILWAUKEE, & ST. PAUL R. CO.

(Wisconsin Supreme Court, April 17, 1888.)

Infant Passenger. — Injury by jumping from Train. — Contributory Negligence. — Instructions. — Plaintiff, an infant ten years old, was sent by his mother, who warned him generally not to leave the train while in motion, on an errand to a town seven miles distant. He boarded a freight-train; and the conductor took his fare and asked him where he was going, but failed to inform him that the train ran past the station for which he was bound, to a switch, and then backed into the station. Plaintiff did not know these facts; and on the train passing the station, becoming alarmed, and fearing that he would be carried beyond his destination, jumped from the train, and was injured, the conductor using no precaution to prevent him from jumping. *Held, —*

1. That the jury were justified in finding such want of ordinary care and prudence as to make the defendant liable.

2. That the plaintiff acted in the emergency as a boy of his age would be most likely to act, and could not be held guilty of contributory negligence.

3. That, although it appeared at a previous trial that the failure to stop the train at the depot was not considered as negligence on the part of the defendant, it was not error for the court in its charge to allude to the failure to stop the train, as tending to show that it was the duty of the defendant to instruct the plaintiff how to act, and put him on his guard against attempting to leave the train while in motion.

4. That it was not error to point out in the charge that it was incumbent on the defendant's part to exercise "the utmost care, diligence, and foresight," where the jury had just been instructed that defendant's negligence must be shown by the preponderance of evidence, and the court explained that, in the case of an infant passenger unattended, greater care was required of a carrier than in case of adults.

5. The defendant could not avoid liability on the ground that plaintiff's parents did not instruct him as to the dangers of the route, they having no knowledge of any unaccustomed irregularity in the movements of the train.

6. That evidence of a witness travelling in the car with plaintiff, that he told the latter he guessed the train would not stop, was admissible, being in immediate connection with plaintiff's act, and explanatory of his motives and mental condition, and thus a part of the *res gestæ*.

APPEAL from Circuit Court, Walworth County; I. B. Winslow, Judge.

Charles H. Hemmingway, an infant, by his guardian, brought an action to recover damages for personal injuries received by jumping from a train while in motion, against the Chicago, Milwaukee, & St. Paul Railway Company. Verdict and judgment for plaintiff, and defendant appeals.

John T. Fish and *H. H. Field* for appellant.

John Winans and *O. H. Fethers* for respondent.

ORTON, J. — This action is to recover damages for personal injuries to the plaintiff, caused by the alleged negligence of the defendant. It has been twice tried, and in both

Facts. instances the plaintiff recovered; and this is its second appearance in this court. The evidence was substantially the same on both trials, and the facts are very fully stated in the report of the case on the former appeal (67 Wis. 668, 28 Am. & Eng. R. R. Cas. 216), and therefore need not be repeated. The negligence charged upon the defendant in the complaint is, *first*, the failure of its servants in charge of the freight-train on which the plaintiff was a passenger, to stop the train at the depot or depot platform when it first arrived there; and *secondly*, their failure to explain to the plaintiff why said train passed said station without stopping, or to give him any information or notice of such fact, or in relation thereto. On the first trial the court substantially instructed the jury that the defendant owed the plaintiff the first of said duties, but not the second. On the first appeal this court held that the company did not owe the plaintiff the duty to stop the freight-train at the platform. As to the second of said duties, and now the only one to be considered, Mr. Justice Lyon said in the opinion, "Whether the court ruled correctly or otherwise in holding that the defendant was under no obligation to anticipate that the plaintiff would attempt to leave the train when he did, which we have seen was equivalent to ruling that it was not bound to notify the plaintiff that the train would pass the depot without stopping, is a question not properly before us on this appeal. Hence we do not determine it." On the last trial, therefore, the neglect to so inform the plaintiff was the sole ground of recovery. The negligence of the defendant in this one respect was submitted to the jury as a question of fact, with the instruction that the defendant's servants "were required to give the plaintiff such care and attention as his safety reasonably required or demanded, in view of his tender years and presumable lack of experience," and much greater care than to an adult passenger. All the general instructions excepted to relate to this duty of the defendant to the plaintiff only indirectly, as a statement of the general principles of law applicable to the age and condition of the plaintiff, and the relations of the defendant towards him as a passenger, to aid the jury in determining the question whether the defendant was negligent in the respect above stated. Conceding that these instructions were correct, the contention of the learned counsel of the appellant is, that the verdict is unsupported by the evidence. On the first trial the jury were instructed, as a matter of law, that the defendant was not guilty of negligence in not causing the plaintiff to be informed that the train would

not stop at the platform in the first instance, or to be warned not to attempt getting off at the platform while the train was moving, or to be instructed as to the movements of the train on its arrival at Janesville; for all this was implied in the instruction that the employees of the company were not bound to anticipate that the plaintiff would or might attempt to get off at the platform while the train was moving. On the last trial the court did not instruct the jury, as matter of law, that the defendant was negligent in this respect, but left that question to the jury as a question of fact. The facts being given or stated, negligence may be a question of law; but in this case we choose to treat the question as the court below treated it, — as one of fact for the jury; and if, in our view, the evidence warranted the verdict based upon the finding of such negligence, it ought not to be disturbed.

1. We think that the facts justified such a finding and verdict. The plaintiff was a boy ten years and ten months old, an ordinary country boy. He resided at Hanover, about seven miles west from Janesville. He was sent to Janesville by his mother on some errand, with the caution that he must not attempt to get off the train while in motion. He went to the caboose, and got on without paying his fare or obtaining a ticket. There were two other passengers, — a gentleman and lady. Soon after the train had started, the conductor came into the caboose, and found the boy sitting on a seat, and asked him his name, and where he was going. The boy told him, and gave him ten cents as his fare. The conductor remained in one apartment of the caboose, without saying any thing more to the boy, until the train came near the round-house, about a mile west of the station. He then left the caboose, and passed over the train to the engine; and, when the engine came opposite the depot, he stepped off, and went into the office to register his train. When the caboose came to the platform, the gentleman who was in the caboose with the boy went out of the car, and stood on the lowest step a moment, and then stepped off the car to the platform. The plaintiff also left his seat, and went out of the caboose, and stood on the upper step; and, as the train was about to pass the platform, he jumped off, or attempted to do so, but struck against the gentleman who got off before him, and fell under the wheels and was injured. It was customary for this freight-train to so pass the platform without stopping, and to go on a distance beyond a switch, to allow passengers there waiting to pass on westerly on the main track. Then the freight train is backed up to the platform, to allow passengers to get off. There is no evidence that either the plaintiff or his parents knew of this

Defendant
guilty of
negligence.
Facts
reviewed.

customary movement of the freight-train. The plaintiff testified that the gentleman with him said that he guessed that the train would not stop; but that he should have attempted to get off there, any way, as he was frightened and excited, and thought that the train would carry him off, and he would not be able to get back. None of the employees of the defendant paid any attention to the plaintiff after he had told his name and destination, and paid his fare in the caboose. The plaintiff evidently supposed that the train would stop at the platform in the first place, so that he might get off. When it did not stop, he did not know when or where it might stop, and he feared that he would be carried away, he knew not where; and he evidently supposed it was necessary for him to jump off as he did, as his last chance of stopping at Janesville. All this seems perfectly natural and consistent with the age and experience of the infant plaintiff. He had been to Janesville three times before, but twice with others; and once, when alone, the caboose stopped at the platform, and he got off there. To this boy plaintiff it was unaccountable that the train did not stop at the platform. He knew of no reason why it would not, and he knew of no other chance of getting off the train. It was running slowly at the time; and, if he had time to think, he evidently thought he could get off safely. Wherein did the conductor fail in his duty to the plaintiff under these peculiar circumstances? is the question that was left to the jury; and the question on this appeal is, Wherein were the jury warranted in finding that he failed in his duty? It seems to us that he so failed at the time he asked the plaintiff his name, and where he was going, and received his fare. He had no reason to suppose that the boy had ever been to Janesville before on this freight-train, or that he knew of this unusual movement of the train past the depot; and he might well have supposed that the boy would be frightened when they passed the depot without stopping, and fear that he was being carried past his destination; and he might also have supposed and anticipated that he would attempt the dangerous expedient of trying to jump off at the depot from the moving train. It would seem that if the conductor had ordinary judgment and discretion, or had been ordinarily thoughtful and prudent, he would have so supposed and anticipated. The questions he put to the plaintiff might well have suggested to him to ask him still further if he knew that the train did not stop at the depot, but would pass by some distance, and then back up, so that he might get off with safety. The conductor might have cured or supplied this failure of his duty to the plaintiff by being present, or by having some one present, when the plaintiff attempted to leave the train, and preventing him from doing so to his injury. He

evidently thought nothing about it, and cared nothing about it. The boy plaintiff was under his care and protection, and his inexperience and helplessness appealed most strongly to that care and protection; and yet he left him without instruction or caution in such a dangerous emergency. Herein we think the jury were justified in finding such a want of ordinary care and prudence as to make the defendant liable. This disposes of the main question as to the liability of the defendant for negligence in not sufficiently caring for the plaintiff.

2. But it is contended that the negligence of the plaintiff in attempting to jump from the moving train contributed to his injury. It was the peculiar province of the jury to determine that question. *Parish v. Eden*, 62 Wis. 272; *Langhoff v. Railway Co.*, 19 Wis. 515; *Curry v. Railway Co.*, 43 Wis. 685; *Leavitt v. Railway Co.*, 64 Wis. 228. **Plaintiff not guilty of contributory negligence.** As a general rule, it is negligence for an adult person to jump from a train of cars in motion. But this is not an invariable rule. A passenger may be exonerated from blame by being suddenly put into a condition of nervous excitement and alarm by the fault of the company, and who jumps from a moving train, under a sudden impulse, to save himself from serious inconvenience. Whether a justification exists may depend upon the speed of the train and other circumstances, or upon whether he did what careful and experienced persons generally would be likely to do under similar circumstances. *Whart. Neg. sect. 377*; *Robson v. Railway Co.*, L. R. 10 Q. B. 271; *Filer v. Railroad Co.*, 49 N. Y. 47; *Johnson v. Railroad Co.*, 70 Pa. St. 365; *Delamatyr v. Railroad Co.*, 24 Wis. 586; *Shannon v. Railroad Co.*, 78 Me. 52; s. c., 23 Am. & Eng. R. R. Cas. 511. In view of this exception to the general principle, the plaintiff here, being of such tender age, and under such great fear and excitement, and with the apprehension that he would be carried away, and beyond his destination, if he did not get off at the platform, may well be exonerated from all blame. The age and infancy of the plaintiff must be considered in such a case, if even he is of such age as to be *sui juris* in respect to many other things. 2 *Thomp. Neg.* 1180. What might appear to be reasonable to a person of such tender age might be most unreasonable to an adult person of more discretion, and it was for the jury to take such difference into consideration in determining the question of contributory negligence of the plaintiff. *Barry v. Railroad Co.*, 92 N. Y. 289; s. c., 13 Am. & Eng. R. R. Cas. 615; *Bryne v. Railroad Co.*, 83 N. Y. 620; *Birge v. Gardner*, 19 Conn. 507; *Swoboda v. Ward*, 40 Mich. 420; *Lynch v. Smith*, 104 Mass. 57; *Plumley v. Birge*, 124 Mass. 57; *Meibus v. Dodge*, 38 Wis. 300. But these considerations are self-evident, and appeal to the common reason and

understanding. The plaintiff acted in the emergency as a boy of his age would be most likely to act.

3. It is contended, also, that the parents of the plaintiff ought to have instructed their son as to the dangers of the route, and how to avoid them. The mother did do so, to the extent of her knowledge, by cautioning him generally not to leave the train when it was in motion. Had she known that it was customary for the train not to stop at the depot on its first arrival there, and of its other movements, it might have been her duty to have informed him of it, as it was the duty of the conductor to have done. But she did not know of such an unaccustomed irregularity in the movement of the train, or she would most probably have informed him of it.

Negligence of
plaintiff's
parents.

4. It is also alleged as error that the court allowed proof of what the gentleman who preceded the plaintiff, in getting off the train, said to him as to whether the train would stop there.

Res gestæ
evidence of
fellow-passen-
ger's remark.

This was said in immediate connection with the plaintiff's act in attempting to get off the train, and was explanatory of his motives and mental condition at the time, and by all authority a part of the *res gestæ*. Twomley v. Railroad Co., 69 N. Y. 158; Shannon v. Railroad Co., 23 Am. & Eng. R. R. Cas. 511; Greenl. Ev. sect. 108, note b; Stewart v. Hanson, 35 Me. 507; Church v. Rowell, 49 Me. 371; Transportation Co. v. Flint, 13 Wall. 3; Cassida v. Railroad Co., 13 Pac. Rep. 438. This evidence was not admitted for the purpose of charging the defendant with liability for what this stranger said at the time, but was admitted only as a part of the *res gestæ*, and was therefore proper. The authorities cited by the appellant's counsel to this point disapprove of such evidence only because it ought not to charge the company with liability. The court, in instructing the jury, said to them that the company was not responsible for the statements of this stranger, and that they were admitted only "as tending to throw light on the condition of the boy's mind at the time, and to show all the circumstances which influenced his action."

5. Those parts of the charge of the court to the jury relating to the general care and protection which infant passengers ought to receive from the servants of the company as the ground of the above duty to inform this plaintiff of the peculiar and unusual movements of the freight-train on its arrival at Janesville, and which were excepted to, appear to have been fair, and strictly correct, in the light of all authorities upon the subject.

6. That part of the charge that called the attention of the jury to the fact that the train did not stop, and was not in-

Care of infant
passengers.

tended to stop, at the platform, and excepted to because it was again submitting such fact to the jury as a failure of duty on the part of the company, which for such purpose had already been disapproved by this court, was evidently given for no such purpose. The jury were distinctly charged that such fact was not admissible to show the negligence of the company or its failure of duty. Such fact was alluded to only to show that, in view of it, it might be the duty of the company to instruct the plaintiff how to act in such case, and to inform him that the train would not stop at the depot, and its subsequent movements, so as to put him on his guard against an attempt to leave the train while thus in motion. For such purpose it was clearly proper.

Charge calling attention to fact that train did not stop.

7. That part of the charge which made it incumbent upon the employees of the company "to exercise the utmost care, diligence, and foresight for the safety" of the plaintiff while under their charge, is excepted to, on the ground that such a decree of care was not the rule in such a case. Abstractly considered, it may be that this part of the charge was not strictly correct. The court, however, had just instructed the jury that the negligence of the company must be shown by a preponderance of the evidence, and accompanied the objectionable language with the explanation that the care of an infant passenger, so unattended, should be greater than that required to be used towards an adult passenger. The language used, and the rule stated, could have no other application than to the failure of the company to so instruct, inform, and protect the plaintiff, under the peculiar circumstances of the case. That, duly performed, would have been the utmost care, diligence, and foresight required under the circumstances. In this view, the rule, even if too stringent as a rule of law, could have done no harm to the defendant. The degree of care was sufficiently and correctly measured by the discharge of this one duty to the plaintiff, so that the jury could not have been misled by the abstract rule. It is very difficult, if not impossible, to find that the company or its employees neglected any other duty towards the plaintiff than such instruction, information, and warning by the conductor, or by his being present, or having some one present, to prevent the plaintiff from so attempting to leave the train at the platform, and to protect him from such hazard. The jury must have understood that this was the true measure of the defendant's care and responsibility, and must have so found, and we think that they were justified in so finding. The case seems to have been most ably tried, and the rulings of the court seem to have been carefully considered, and correctly and judiciously made. We can find no error in the rulings of the court, and on the merits of

Instruction as to degree of care required.

the case we would not be warranted in disturbing the verdict. The judgment of the Circuit Court is affirmed.

Alighting from Moving Trains. — See generally *Raben v. Central Iowa R. Co.*, and note, 31 Am. & Eng. R. R. Cas. 45-50; *Penna. R. Co. v. Peters*, and note, 30 Ib. 607-612; *Harmon v. Washington & G. R. Co.*, 30 Ib. 627.

Contributory Negligence in jumping from Train to avoid being carried past Destination. — In *Reibel v. Cincinnati, I. St. L. & C. R. Co.* (Ind.), 17 N. East. Rep. 107, it was held, that, while it is the duty of a railroad company to stop its train at a passenger's destination long enough to permit him to alight in safety, the fact that the train is about to pass such point without stopping will not justify a passenger in incurring any serious risk by jumping from the train; and when a passenger is injured by thus jumping from a train in motion, he cannot recover without an averment that he was so compelled to quit the train by the railroad company.

Justice Niblack, in delivering the opinion to the court, said, "The general rule is, that passengers who are injured while attempting to get upon or off a railroad train while it is in motion cannot recover for their injuries. *Wood, R. R.* 1126; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; s. c., 41 Ind. 48.

"To this general rule some exceptions have been recognized, one of which is where the passenger is either ordered or invited by the conductor or its agent to get on or off, notwithstanding the motion of the train. *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind. 26; *Lake Shore & M. S. R. Co. v. Pinchin*, 31 Am. & Eng. R. R. Cas. 428; 112 Ind. 592; *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441.

"But a passenger must not attempt either to get out of or off a train while it is in motion, if it be obviously dangerous to make the attempt, although he may have been advised or even ordered to so do by the servants of the company. *Wood, supra*, 1127.

"Such an attempt is at the peril of the passenger when he is a person of ordinary intelligence, and not acting under constraint. While it is the plain duty of a railroad company to stop its train at the place of a passenger's destination long enough to permit him to get off with safety, the fact that a train is about to pass such place of destination without stopping does not justify the passenger in incurring any serious risk by jumping from the train. In such a contingency the passenger's remedy is against the company for carrying him past his place of destination.

"It was not expressly charged, in the first paragraph of the complaint, that *Reibel*, the decedent, was required by the railroad company to get off the train at Sunman station, as he did. We construe the averment that he was so compelled to quit the train at that place, to mean that he had to jump from it to prevent being carried past his place of destination. In the light of this construction, he was guilty of contributory negligence in jumping from the train under the circumstances as they are described in the said first paragraph of the complaint, which was, in consequence, rightly held to be insufficient upon demurrer."

Injury alleged to have been caused by Car starting while Passenger was alighting. — **Verdict against Weight of Evidence.** — In an action against a railroad company for injury to a passenger, alleged to have been caused by the train suddenly starting while he was alighting from it, contributory negligence having been pleaded as a defence, eleven witnesses, many of them disinterested, testified that the train stopped long enough to allow passengers to alight safely; and their testimony was only contradicted by that of plaintiff and two boys. Two disinterested witnesses testified that plaintiff had left the car and was standing on the ground when the train started. Several witnesses testified that the usual signals were given before the train started. *Held*, that a verdict for

plaintiff was so clearly against the weight of the evidence, that a new trial should be granted. *Gulf, Colo. & S. F. R. Co. v. Williams* (Tex.), 7 S. W. Rep. 88.

Passenger alighting safely from a Train in Motion, but who falls under Train by running against other Passenger, cannot recover. — A paragraph in a complaint admitting that plaintiff's intestate jumped from defendant's train, and alighted on the platform, but was run against by a fellow-passenger, and fell under the train, and was killed, is insufficient, in failing to state affirmatively that defendant's failure to stop the train was the proximate cause of decedent's death. *Reibel v. Cincinnati, I. St. L. & C. R. Co.* (Ind.), 17 N. East. Rep. 107.

Instruction that if Car started while Passenger was alighting, Plaintiff can recover, is Erroneous in not considering Plaintiff's Negligence. — In an action to recover for injuries received in getting off defendant's street-car, the court instructed the jury, in effect, that if, when plaintiff was in the act of alighting, the car suddenly started at the will of the driver, and plaintiff was thrown down and received injuries, defendant was liable. *Held*, error, as it took from the jury the consideration of the fact whether defendant was guilty of negligence in so doing. *West End & A. St. R. Co. v. Mozely* (Ga.), 4 S. East. Rep. 324.

Injury caused by Passenger's Clothing catching in Broken Curtain Hook while leaving Car. — A broken spring hook, used to fasten a curtain on an open railway car, is not of such a dangerous character as to require the very highest degree of diligence to discover and remove it; and when the company was in the habit of inspecting such hooks at the end of each trip, and replacing those found defective, and no similar accident had been caused by one before, and there was no proof showing how or when the spring was broken, *held*, in an action against the company by a passenger injured by her clothing catching in such a broken hook, that the accident was not one which a prudent man would have anticipated; that the evidence failed to establish culpable negligence in the defendant; and that the trial judge should have held as matter of law that the plaintiff had failed to establish a case entitling her to a recovery. *Kelly v. New York & Sea Beach R. Co.* (N.Y.), 15 N. East. Rep. 879.

Instruction that Fact of Injury constitutes no Ground for Recovery, not Error. — In an action against a railroad company for personal injuries, an instruction to the jury that "the fact that the plaintiff has brought his suit constitutes no ground whatever upon which he is entitled to a verdict. The fact that he was hurt by a railway car constitutes, by itself, no reason whatever why he is entitled to a verdict," is not error. *Rose v. West Philadelphia R. Co.* (Pa.), 12 Atlantic Rep. 78.

Improper Language of Counsel in addressing Jury as Ground for New Trial. — In a suit against a railroad for injury, plaintiff's counsel said to jury, "You ought to deal severely with these bloated corporations that can run their road right through a man's house or yard," and the court did not control him, and the jury found a verdict for plaintiff "for amount sued for" (\$20,000), *held*, that it was reasonably evident the jury were influenced by the improper language, and the court should have given a new trial. *Galveston, H. & S. A. R. Co. v. Cooper* (Texas), 8 S. W. Rep. 68.

Release of Claim against Railroad for Personal Injuries. — Instruction concerning. — In an action against a railroad company for negligence, defendant pleaded a release. Plaintiff claimed it had been obtained by fraud. The court charged in regard to it, "It is not to be set aside upon suspicion, — not to be set aside upon any but the strongest and clearest testimony. . . . To infer fraud . . . is to infer a criminal thought or disposition in a man, which is against the presumption of the law. . . . If [plaintiff] understood what he was doing when he signed that paper, — and the presumptions are that he did,

— this release estops him. . . . You are not to find against the validity of the paper on the mere ground that the bargain was a hard one. And it does not militate against the transaction if the company endeavor to get the best of it." Also, that if the defendant obtained the release by encouragement that plaintiff would be taken into its employ, which was not done, that fact would not avoid the release. *Held*, no error. *Rose v. West. Phila. R. Co. (Pa.)*, 12 Atlantic Rep. 78.

Five Thousand Dollars for losing Use of Arm, and Injury to Shoulder and Spine, not Excessive. — A verdict of \$5,000 damages to a lady fifty-seven years old who has lost the free use of one of her arms, has had her shoulder and spine injured so as to produce great pain, and whose general health has been rendered bad, will not be set aside as excessive. *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370.

RABEN

v.

CENTRAL IOWA R. CO.

(*Iowa Supreme Court, Dec. 20, 1887.*)

Passenger. — Duty of Conductor to assist Passenger to alight. — No duty rests upon the conductor of a railway train to assist a female passenger to alight from the car.

Same. — Duty of Conductor in starting Train as to Passengers alighting. — The conductor of a railway train is only required, after having the station announced, to stop the train, and hold it such reasonable time as will permit the passengers to alight in safety. It is not his duty "to know" that a passenger has left the cars before he gives the signal to start.

APPEAL from District Court, Keokuk County; D. Ryan, Judge.

Action by James B. Raben to recover for personal injuries sustained by his wife through the negligence of plaintiff's employees, while she was getting off of a car in which she was a passenger. There was a judgment upon a verdict for plaintiff. Defendant appeals.

A. C. Daly and George D. Woodin for appellant.

Sampson & Brown for appellee.

BECK, J. — I. This action is brought to recover by the husband for injuries sustained by his wife, who had brought a suit in her own name to recover for the same injuries. A
 Facts. judgment in favor of the wife in her action was reversed by this court. See 31 Am. & Eng. R. R. Cas. 45. The petition of plaintiff in this case alleges that his wife was a passenger upon a car on defendant's railroad, having her own two

small children with her. When she reached her place of destination, she proceeded to leave the car with her children, who were taken from the car when the train began to move, through the negligence of defendant's employees, without allowing her sufficient time to get off; and, in attempting to do so, she was thrown down and injured. Plaintiff alleges (referring to his wife getting off of the car), "The conductor did not help her, nor offer to do so, nor advise her that it was not safe to get off, wherefore, he says that the said injury was caused by the negligence and want of care of the conductor," etc. The evidence tended to support the allegations of the plaintiff's petition.

2. The District Court, in presenting the issues of the case to the jury, among other things stated that the petition alleges that the conductor negligently failed to see whether plaintiff's wife had alighted from the car, and caused the train to start before she had time to do so safely, and that "defendant failed to assist her to alight," thereby causing the injuries. In the third instruction the court directs the jury, that, to entitle plaintiff to recover, he must show by affirmative evidence, among other things, "that such injuries were caused directly by the negligence of defendant's employees, as substantially alleged." In the fourth instruction the court directed the jury, that it was the conductor's duty "to place her [plaintiff's wife] or enable her to alight in safety on the platform." In these instructions the court plainly directs the jury that it was the conductor's duty to assist plaintiff's wife to alight from the car. This court has held the law to be different, and that no such duty rests upon the conductor. *Raben v. Railway Co.*, 31 Am. & Eng. R. R. Cas. 45. The instructions just referred to are therefore erroneous.

Conductor not bound to assist passenger to alight.

3. The seventh instruction directs the jury, that if the conductor "negligently failed to look and know that she [plaintiff's wife] had left the train in safety," and negligently started the train before she had done so, without her fault or negligence, plaintiff is entitled to recover. The instruction announces the rule, that it was the conductor's duty to ascertain — "to look and know" — whether the plaintiff's wife had safely alighted. It imposes the duty upon the conductor not to start the train until he had made sufficient inspection of the car and passengers to be certain — "to know" — whether the passengers had left the car, and were safely on the platform. We think the law imposes no such duty. The conductor is required, after having at a proper time announced the station, to stop the train, and hold it such reasonable time as will permit passengers to alight in safety. He is not required to do what, in many cases, would be impossible to ascertain, — "to

Duty of conductor in starting train.

know " that all passengers intending to stop at the station have alighted in safety. *Imhoff v. Railway Co.*, 20 Wis. 344; *Railroad Co. v. Slatton*, 54 Ill. 133; *Clotworthy, v. Railway Co.*, 80 Mo. 220; s. c., 21 Am. & Eng. R. R. Cas. 371; *Shear. & R. Neg. sect.* 275; *Railway Co. v. Stutler*, 54 Pa. St. 375.

Other instructions than those just noticed we think objectionable. Other objections, or the rulings on which they are founded, may not be repeated in a new trial, and need not be considered.

For the errors pointed out, the judgment of the District Court is reversed.

Duty of Servants of Railroad Company to assist Passengers to alight. — A railroad company is not bound to render its passengers personal assistance in alighting from its trains, when they are in proper condition, and suitable and safe means are provided therefor; and an instruction to the jury to the effect that they are is erroneous. *Raben v. Central Iowa R. Co.*, 31 Am. & Eng. R. R. Cas. 45.

In an action for injuries received by plaintiff in alighting from defendant's train, a charge that it is the duty of a conductor to assist passengers from the train is erroneous. In such an action it is also error to charge that it is the special duty of the conductor to assist from the train any passengers who are "aged, helpless, and infirm." *Simms v. South Carolina R. Co.*, 30 Am. & Eng. R. R. Cas. 571.

Injury to Passenger alighting from Train starting without Signal. — **Instruction.** — In *Gulf, Colorado, & S. F. R. Co. v. Williams (Texas)*, 8 S. W. Rep. 78, plaintiff, a passenger on defendant's train, was injured while alighting at a depot; and in an action for damages the court charged that he was entitled to recover if defendant's servants did not stop the train a reasonably sufficient time, or did not give signal of starting again by the whistle or bell. *Held*, error, in that the jury would be compelled to find for plaintiff if no such signal had been given, even though the train may have stopped a sufficient length of time, thus inducing the belief that plaintiff might leave the train without negligence at any time before signal of intention to start again. The court said, —

"It was incumbent on the plaintiff to prove that his injury resulted from the negligence of the servants of the appellant. It would ordinarily be negligence in a railway company, when reaching a place at which passengers are to leave its train, to put the train in motion again before passengers had sufficient and reasonable time to alight; for they would be expected to do so, and would incur danger if the train was put in motion while they were in the act of alighting. It does not follow, however, if a train be stopped for sufficient and reasonable time, that it will be negligence *per se* to put it in motion again without giving signal of intention to do so by whistle or bell or otherwise. The charges inform the jury, in effect, that the appellant was guilty of actionable negligence if it failed to stop its car for a sufficient and reasonable time to enable passengers to alight, and that it was negligent if, after stopping its train at the place where appellee was to leave it, it started again without giving signal by whistle or bell. The charge was not that the two acts combined would constitute negligence, but that either would. In the absence of a statute requiring a signal to be given by bell or whistle, it is error for a court to instruct a jury that it is negligence to put a train in motion without a signal so given. There is no statute in force in this State requiring a signal to be so given before a train is put in motion, after having stopped at a station where passengers are to alight. The jury may have believed, under the evidence, that the train stopped at Alvin sufficiently long to enable the appellee

to leave the train with safety; yet, under the charge, they would have been compelled to find for him, notwithstanding this, if a signal of intention again to put the train in motion was not given in one of the modes specified. It was also necessary that it should appear that the appellee was not guilty of contributory negligence. The tendency of the charge was to induce the jury to believe that the appellee, without negligence, might attempt to leave the train at any time before a signal of intention to move it was given in one of the modes pointed out in the charge, without reference to the length of time the train remained at the station. A case might arise in which it would be negligence to put a train in motion without signal, when it had remained at a station a sufficient length of time to enable passengers to leave it in safety; but whether so in a given case, would be for the determination of the jury in view of all the facts. But a court would not be authorized to inform the jury that the failure to give a signal would be negligence, and less still would it be authorized to instruct that the failure to give a signal in a specific manner would be negligence. The charge was, that appellant was "required to give signal of starting again by whistle or bell," by which the jury were given to understand that the law imposed this specific act as a duty. If this were true, an omission in this respect was negligence; and, throughout the charge, the court assumed and declared that the specific duty existed, and that a failure to perform it was negligence. Whether this omission, if it occurred, was negligence, depended on all the facts existing at the time the appellee attempted to leave the car, and was for the determination of the jury. The charge practically withdrew this question from them, and required a finding that the servants of appellant were negligent if the jury believed from the evidence that the car was put in motion without signal given by bell or whistle. For this error the judgment will be reversed, and the cause remanded."

Facts which Jury may consider in determining whether Train stopped long enough to allow Passenger to alight. — In an action by a woman in good health, sixty-five years old, and weighing one hundred and seventy pounds, and who was a passenger on defendant's train, to recover damages for personal injuries caused by starting the train while she was in the act of alighting, the jury may take into consideration the "age, sex, and physical condition" of the plaintiff in determining whether the train stopped sufficiently long to enable her to get off, and whether she in so doing acted with ordinary care and diligence. *Hickman v. Missouri Pac. R. Co.* 91 Mo. 433.

Train starting while Passenger was attempting to get on. — **Time promised by Conductor.** — In *Texas P. R. Co. v. Davidson*, 68 Tex. 370, an action for damages against a railroad company caused to the plaintiff by the train starting up while she was attempting to get on, an instruction to the jury that if the averments of the plaintiff were true, including an averment that she had been promised ten minutes by the conductor in which to check her baggage, and the train started before that time expired, then they should find for the plaintiff, was held not erroneous as laying too much stress on the time promised her by the conductor.

Conductor pulling Passenger from Car after Train had started. — In *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, the plaintiff was a passenger on a railroad train. The train, having stopped at the station to which she had taken passage, was ordered to start again before she could alight, though after she had reached the platform of the car. The conductor, while the train was in motion, pulled her from the platform to the ground, causing her great injury. *Held*, that in an action against the railway company for the tort of the conductor, it was not necessary, in order to fix the liability of the defendant, to allege that it authorized this particular act, nor that the conductor was acting within the scope of his authority.

OWENS *et al.*

v.

KANSAS CITY, ST. JOSEPH, & COUNCIL BLUFFS R. CO.

(*Missouri Supreme Court, May 21, 1888.*)

Injury to Passenger. — Examination of Plaintiff's Person. — In an action for personal injuries, the granting of an order for the examination of the plaintiff's person is a matter in which the court has a discretion which will not be interfered with, unless manifestly abused, and where the evidence given is such that a medical examination could add no information as to her previous health, and but little to her subsequent condition, the ruling of the trial court in refusing the order will not be disturbed.

Same. — Description by Plaintiff of her Injuries. — In an action for personal injuries, the description by the plaintiff of the injuries which she received is not in the nature of expert evidence, and in describing them she may testify that the nerves of her head, side, and left limb are paralyzed.

Same. — Instructions as to Liability for Negligence of Servants. — The plaintiff received injuries in alighting from the defendant company's train. The court instructed the jury, that if the train did not stop long enough for the plaintiff to get off, and while she was standing on the platform defendant's brakeman pulled her off, whereby she was injured, she can recover. *Held*, not erroneous, as in another paragraph the court told the jury that under such a state of facts the plaintiff could not recover if guilty of contributory negligence.

Same. — Liability for Injury to Diseased Person. — Invalids, as well as persons in robust health, are entitled to the highest degree of care on the part of common carriers. A passenger who receives injury through a carrier's negligence may recover for all the ill effects which naturally and necessarily follow the injuries in the condition of health in which such passenger was at the time; and it is no answer to say that the injuries would not have occurred, or would not have been so great, had the passenger been in good health.

APPEAL from a judgment of the Lafayette Circuit Court, Struther, J., against defendant in a suit for injuries from defendant's negligence. Affirmed.

The facts are stated in the opinion.

Strong & Mosman, J. D. Shewalter, and R. P. C. Wilson for appellant.

Woodson & Woodson, Wallace & Chiles, Green & Burnes, Anderson & Cormack, and S. C. Woodson for respondents.

BLACK, J. — This is a suit for personal injuries to the plaintiff, Mrs. Owens, wife of the other plaintiff. She prevailed in the court below, and the defendant appealed.

Facts.

On the 20th of November, 1883, she and her daughter were passengers on one of the defendant's trains from Kansas City to

Beverly. The petition, which is very lengthy, states, in substance, that defendants negligently failed and refused to stop the train at Beverly long enough to allow the plaintiff a reasonable time to alight in safety; that as soon as the train stopped, she stepped to the door of the car to get off; that when she arrived at the car platform the train was negligently put in motion by defendant; that the brakeman, knowing the train was in motion, unlawfully assaulted, seized, and took hold of her, and violently and negligently pulled and threw her from the cars to the depot platform, inflicting upon her bruises, wounds, etc.; that on account of negligently putting the train in motion, and negligently pulling and throwing her from the platform of the car, she has suffered pain, etc.

The answer is a general denial, with the further defence that plaintiff was guilty of contributory negligence in attempting to get off the train when in motion.

The evidence for the plaintiff tends to show, that, when the train began to slack up, the brakeman said, "This is Beverly;" that he picked up the plaintiff's valise and walked towards the car door; that the daughter followed him, and plaintiff followed the daughter; that the brakeman assisted the girl to the depot platform. Plaintiff says, when she got to the platform, two persons were getting on the car, so that she stepped through on the platform of the car in front; that she took hold of the iron rod that extended around the car; that the train was then moving faster; that the brakeman, who was on the depot platform, walking to keep up with the car, reached up and caught her between the elbow and wrist, and pulled her to the depot platform; that she then became unconscious from injuries to her head, arm, hip, and side. This evidence is corroborated by that of the daughter; and other evidence is, that the train stopped from ten seconds to a minute only.

The evidence for the defendant tends to show that the train stopped for the usual and for a reasonable time; that plaintiff attempted to get off after the train had started, and that she fell from the platform of the car; that the brakeman warned her not to get off, and at the same time was trying to signal the engineer to stop.

1. The suit was commenced in the Platte Circuit Court, and transferred to the Lafayette Circuit Court by change of venue. There defendant, at the March term, 1884, filed a motion asking the court to require plaintiff to submit her person to an examination by a commission of medical experts, to be appointed by the court, in order to determine the character of the injuries, and to what extent they were due to the accident. This

Right of
defendant to
examination
of plaintiff's
person.

motion was not determined until the term at which the cause was tried, — April, 1885, — when it was overruled, and the defendant excepted.

It was in substance held, in *Shepard v. Missouri P. R. Co.*, 85 Mo. 629, that the defendant has no absolute right to have a personal examination; that it is a matter in which the court has a discretion, the exercise of which will not be interfered with unless manifestly abused. Of course, the court is not bound to refuse or to grant the motion to the full extent of the prayer. Its order may be moulded to suit the circumstances of the case. In that case the plaintiff, a lady, had once submitted to an examination by one physician, and offered to submit to an examination by another eminent and reputable surgeon; but with this the defendant was not satisfied. Under these circumstances, we held in that case that there was no error in refusing the motion. In the later case of *Sidekum v. Wabash, St. L. & P. R. Co.*, 10 West. Rep. 277, 93 Mo. 400, it was held there was no error in refusing such a motion. In that case the trial court was of the opinion that an examination was not necessary in order to ascertain the real condition of the plaintiff, and the nature and extent of her injuries. This court, upon an examination of the evidence, reached the same conclusion. The ruling is certainly based in part upon that ground. The power of the court to make and enforce an order for the personal examination of the injured party must be taken as established in this State, as it is in many others. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375; *White v. Milwaukee City R. Co.*, 61 Wis. 536; *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466. The court might, with propriety, have made an order for the examination of the plaintiff in this case, by a disinterested, reputable physician, in the presence of her husband, if desired, and lady friends. But the real question here is whether there has been an abuse of the discretion lodged in the trial court.

In the plaintiff's deposition, taken and filed before this motion was made, she says, that, when the brakeman pulled her from the car step, her head, left arm, and hip struck against the car; that because of the injuries then received she has lost the use of her left arm and her left leg; that the arm is paralyzed; that since then she has not been able to stand on her feet, whereas before she was able to attend to her household duties.

She was cross-examined for many days and at great length, answering between five and six hundred questions, often in the presence of physicians employed and taken to the bedroom by defendant, but not introduced to her. This examination

shows that she received an injury in the back when thirteen years of age ; that a few years before the accident in question she went to Denver for her health ; that while there her shoulder was dislocated ; that she was subject to rheumatism in her left side and arm, and suffered from what she terms rheumatic neuralgia, and had been under the charge of a physician for years. Much other evidence was offered, on the one side and the other, disclosing the state of her health both before and after she received the injuries complained of. This evidence was given by persons who could and did detail facts within their observation. Some of it goes to show that there was no perfect paralysis, but that she was suffering greatly from the injuries cannot be doubted. A medical examination could add no information as to her previous health, and but little to her subsequent condition. It is suggested that she represents her condition to be worse than it really is, and that she has misled her two physicians, who were examined and cross-examined at length. We discover no real ground for such suggestion ; and, if any there is, it was matter of observation to the jury. Since the evidence easily attainable, and really in the case, shows a history of her health for a large portion of her life, and also shows her physical condition since the accident, and what acts she can do and what she cannot, we will not disturb the ruling of the trial court.

2. The court, in the first instruction for plaintiff, in substance said, that if, after the station was announced by the brakeman, the plaintiff, with reasonable and usual expedition, went to the platform of the car ; and before she could get off, the train was started ; and while on the car step, waiting for the car to stop, the brakeman took hold of her arm and pulled her to the depot platform, and she was injured, etc., — then she was entitled to recover. The seventh instruction declares that it was the duty of the defendant to stop the train a reasonable time for the plaintiff to get off, — i.e., such a time as is required for a person using ordinary diligence to get off ; and if the train was started before plaintiff had such reasonable time, then defendant was guilty of negligence ; and if the jury further believed that the brakeman pulled her from the car, while in motion, to the depot platform, and she was injured, then, etc.

Correctness of
instructions.

The objection to these instructions, that they allow a recovery upon proof alone of negligence in failing to stop a reasonable time, is not well founded ; for in both instructions the jury were required to find the further fact that the brakeman pulled her from the car while in motion. It is true, no finding is, in terms, required that he negligently pulled her from the car ; but if the train started without giving her time to get off, and the brakeman pulled her off while the car was in motion, it was a negli-

gent act. The contrary theory, presented by the defendant's evidence, — namely, that she persisted in getting off, though warned not to do so, fell, and was caught by the brakeman, — was presented by instructions given at the request of the defendant. The evidence of the defendant is an out-and-out denial that the brakeman pulled her off at all. The instructions present the real issue made by the evidence.

The next objection to these instructions is, that the plaintiff cannot sue for an assault, and recover for negligence in failing to stop the train. The petition does make some extravagant averments; but, notwithstanding it charges an assault by the servants, it also in terms charges negligence in not stopping the train a reasonable time, and negligence on the part of the servant in pulling her off. The instructions cannot be said to be a departure from the petition. The petition contains all that is in the instructions, and more too; and it follows that it is not a case of declaring upon one cause of action and a recovery upon another. *Conway v. Reed*, 66 Mo. 350.

The final objection to these two instructions is, that they ignore the defence of contributory negligence, because they do not conclude with some such words as "provided the plaintiff was not negligent." On this defence the court gave a number of instructions, one of which is as follows: —

"3. If the jury believe, from the evidence, that the plaintiff recklessly or negligently attempted to alight or jump from the train, and the brakeman either tried to keep her from so doing, or to assist her to alight after she voluntarily attempted to do so, and that he tried to keep her from getting off, then the jury will find for defendant, no matter what her injuries may have been, or what her condition now is."

To say, with these instructions, that the jury could find for plaintiff without regard to negligence on her part, is little short of charging them with corruption. The instructions are to be taken as a whole, — are so taken by men of common understanding, and can be understood in no other way. There is no necessity for qualifying each by an express reference to the others. They thus qualify themselves when in the form these instructions are. The contrary ruling in *Sullivan v. Hannibal & St. J. R. Co.*, 88 Mo. 182, is not to be followed.

3. The instruction that, if any witness had wilfully sworn falsely to any material matter, the jury are at liberty to disregard the whole of his evidence, is without valid objection. It is sufficient that the witness either wilfully or knowingly swore false. *State v. Palmer*, 88 Mo. 568; *White v. Maxcy*, 64 Mo. 552. Defendant asked, and had given, a like instruction; and it is in no

Weight to be
given to testi-
mony of wit-
ness who swore
falsely.

position to say there was no evidence to justify the giving of such an instruction.

4. The fourth and eighth instructions are in substance the same, and may be considered together. The eighth is, that if plaintiff was pulled off the car, against her will, by defendant's servant, acting within the scope of his employment, and she thereby received injuries, — "then the defendant is responsible for all the ill effects which naturally and necessarily follow the injuries in the condition of health in which plaintiff was at the time; and it is no defence that the injuries may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health, or that by reason of latent disease the injuries were rendered more serious to her than they would have been to a person in robust health."

No defence that injuries were aggravated by plaintiff's ill health.

This instruction, it will be seen, is almost the same as that in the case of *Brown v. Hannibal & St. J. R. Co.*, 66 Mo. 588, which was approved by this court. There, it is true, the instruction was predicated upon the fact that plaintiff was "unlawfully and wilfully put off the car." But if the plaintiff was negligently pulled off the car, she has the right to be compensated for all the injuries which she would not have sustained had due care been exercised. Invalids, as well as persons in robust health, are entitled to the exercise of the highest degree of care on the part of the common carrier. It is no answer to say that the injuries would not have occurred, or would not have been so great, had the passenger been in good health. *Allison v. Chicago & N. W. R. Co.*, 42 Iowa, 274.

5. It was competent for the plaintiff to describe the injuries which she received; and it is no ground for excluding this evidence because she says the nerves of her head, side, and left limb were paralyzed. It is not in the nature of expert evidence.

Plaintiff's description of her injuries.

6. When the plaintiff's deposition was taken, and, as a part of the cross-examination, counsel for the defendant read over twelve or fourteen questions and answers, of which the following are a part, —

Witness. Credibility. Conflicting statements.

"Q. I will ask you if, during your suffering from inflammatory rheumatism, you were not in the habit of using opiates, — morphia?"

"A. No, sir; not to excess. I could take morphia into the stomach, and it relieved it.

"Q. I will ask you if you did not take it regularly?"

"A. Not for my shoulder."

She was then asked, and made answer, as follows: —

"Q. Is not the foregoing a true and literal statement of ques-

tions, and your answers made thereto, in this room on the first day that your deposition was attempted to be taken in this case? and was not that statement made in the presence of Charles A. Blair, a stenographer, who at the time was, by agreement of parties, present for making such stenographic report?

"A. It is false from beginning to end. It is not a true statement."

The court, on motion of the plaintiff, excluded all of the above-described portion of the deposition, and defendant excepted.

It seems a previous effort had been made to take plaintiff's deposition by her attorneys; but it had not been completed, signed, or certified, and hence not filed in this cause. The plaintiff, throughout her examination read in evidence, concedes that she had used morphine, but says it was by way of injection only.

Now, in the first place, as the witness was a party to the suit, it was not necessary to ask these questions to lay a foundation to impeach her evidence. Her declarations could be offered in evidence as against her, without laying any foundation therefor. Again: this portion of the deposition was of no benefit to defendant unless followed by proof that she did make the alleged answers to the alleged questions. The defendant did not show, or offer to show, that she made any such statements; and the portion of the deposition in question was properly excluded.

7. Many other questions are made in the briefs for appellant; but they are less substantial than those before considered, and will not be followed out in detail in this opinion.

The case seems to have been fairly tried, and the judgment is affirmed.

Ray and Sherwood, JJ., dissent; the other judges concur.

Aggravation of Injury by Previous Disease or Feebleness. — In Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544, an action for injuries caused by the tort of a carrier, the plaintiff was held entitled to full compensatory damages, although the wrong-doer did not know, or could not foresee, that the special injury would be greater to the person upon whom it was inflicted than to one in full strength and robust health.

The court said, "The tenth instruction does not express the law, and was rightfully refused. It is not necessary that the wrong-doer should apprehend the particular consequences which may proximately result from this act, although the act must be of such a nature as to produce some injurious result. To illustrate, a man ill with consumption, who is wrongfully injured in alighting from a train, and so injured as that a hemorrhage results, has a right to recover, although the servants of the carrier may not have had reason to apprehend such a result. Jeffersonville, M. & I. R. R. Co. v. Riley, 39 Ind. 568.

"In no case is it necessary that the particular result which follows should be anticipated. Certainly no man who strikes a feeble person and injures him can be heard to say that he did not anticipate that it would hurt him more than it would have done a robust man.

"Where a tort is committed, and injury may reasonably be anticipated, the wrong-doer is liable for the proximate results of that injury, although the injury extends farther than it would have done had the injured person been in perfect health.

"It is the general character of the act, and not the particular result, that the law regards.

"It is true that the act which causes the injury must be a negligent one, and this it cannot be unless the facts show that it was one which ordinary care would have enabled the person who does it to foresee and provide against. *Wabash, St. L. & P. R. Co. v. Locke*, 11 West. Rep. 877.

"There is a plain difference between the wrongful act and its consequences; for, when a wrongful act is done, the wrong-doer must answer for all proximate consequences, although he may not have foreseen or anticipated the particular form or character of the resulting injury. The doctrine which the authorities lay down is thus stated in *Hill v. Winsor*, 118 Mass. 251: 'The accident must be caused by the negligent act of the defendants, but it is not necessary that the consequences of the negligent act should be foreseen by the defendants. It is not necessary that either the plaintiff or the defendants should be able to foresee the consequences of the negligence of the defendants, in order to make the defendants liable. It may be a negligent act of mine in leaving something in the highway. It may cause a man to fall and break his leg or arm, and I may not be able to foresee the one or the other.'

"In another case it was said, 'It is not necessary that injury in the precise form in which it in fact resulted should have been foreseen.' *Lane v. Atlantic Works*, 111 Mass. 136. In *Newell v. Whitcher*, 53 Vt. 589, the court was asked to charge the jury 'that, if the defendant's acts and conduct would not have injured a person of ordinary nerve and courage, then there can be no recovery;' and it was held that this instruction was properly refused.

"But we cannot add to the length of our already very lengthy opinion by commenting upon the authorities. We refer without discussion to some of the many decided cases: *Jeffersonville, M. & I. R. R. Co. v. Riley*; *Terre Haute & I. R. R. Co. v. Buck*; *Louisville, N. A. & C. R. Co. v. Falvey*, 22 Am. & Eng. R. R. Cas. 522; *Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551; s. c., 28 Am. & Eng. R. R. Cas. 170; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179; s. c., 25 Am. & Eng. R. R. Cas. 313, and cases cited, 188; *Stewart v. Ripon*, 38 Wis. 584; *Oliver v. La Valle*, 36 Wis. 592; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *McNamara v. Clintonville*, 62 Wis. 207; 51 Am. Rep. 722; *Brown v. Chicago, M. & St. P. R. Co.*, 54 Wis. 342; s. c., 41 Am. Rep. 41; *Williams v. Vanderbilt*, 28 N. Y. 217; *Ehrgott v. Mayor*, 96 N. Y. 264, 48 Am. Rep. 622; *Beauchamp v. Mining Co.*, 50 Mich. 163, 45 Am. Rep. 30; *Barbee v. Reese*, 60 Miss. 906; *Railway Co. v. Kemp*, 61 Md. 74; s. c., 18 Am. & Eng. R. R. Cas. 220; *Fitzpatrick v. Railway Co.*, 12 U. C. Q. B. 645. 'The general rule,' says an eminent court, 'is, that, in actions of tort like the present, the wrong-doer is liable for all the direct injury resulting from his wrongful act; and that, too, although the extent or special nature of the injury could not with certainty have been foreseen or contemplated as the probable result of the act done.' *Railway Co. v. Kemp*, *supra*. A late writer collects many cases, and lays down the rule, in very strong terms, as we have declared it. 2 Wood, Ry. Law, 1232. We conclude that, both upon principle and authority, an injured person may recover compensatory damages for injuries sustained, although the wrong-doer did not know, or could not foresee, that the special or particular injury would be greater to the person upon whom the wrong was actually inflicted than to one in full strength and robust health. A person, feeble or strong, young or old, is entitled to recover full compensation for the injury actually sustained by the acts of a wrong-doer."

See *Louisville, etc., R. Co. v. Falvey*, and note, 22 Am. & Eng. R. R. Cas. 522, 536.

Exhibition of Injured Parts in Action for Personal Injuries. — In Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 544, an action for personal injuries caused by the tort of a servant of a railroad company, the plaintiff, while testifying in her own behalf, exhibited to the jury the injured part. *Held*, that it was not error to permit the exhibition. The court said, "There was no error in permitting this to be done. The text writers and the decisions all agree that such an exhibition is not improper. Dr. Wharton says, 'Injury to the person may also be proved by inspection. Thus, in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial.' Whart. Crim. Ev. sect. 312. Mr. Best, speaking of this species of evidence, denominates it 'real evidence,' and says, 'Immediate evidence is where the thing which is the source of the evidence is present to the senses of the tribunal. This is of all proof the most satisfactory and convincing.' 1 Best, Ev. (Morgan's Ed.) 307. The old writers often speak of such evidence; and in Hale, P. C. 633, a notable instance is given of its force. Mr. Taylor collects a number of cases, affirms that the species of evidence here under discussion is always competent, and assigns to it the highest rank. 1 Tayl. Ev. sect. 512. An American author, discussing the subject, says, 'The injured member may be exhibited to the jury.' Abb. Tr. Ev. 599. In a recent article by Judge Thompson, entitled 'Trial by Inspection,' many cases are collected, all holding that exhibitions of persons or things are proper. 25 Cent. Law J. 3. Henry Wade Rogers, in an article entitled 'Profert of the Person,' also discusses the subject, and collects many authorities, all agreeing that exhibitions of injuries are not improper. 15 Cent. Law J. 2. Cases on the general subject are also collected in Thurman v. Bertram, 20 Alb. Law J. 151. In Osborne v. City, 32 Fed. Rep. 36, it was held not error for a surgeon to thrust a pin into the side of a person alleged to be paralyzed, in the presence of the jury. Without further comment, we refer to other cases which are directly in point. Schroeder v. Railroad Co., 47 Iowa, 375; Mulhado v. Railroad Co., 30 N. Y. 370, and note; State v. Wieners, 66 Mo. 29. The principle has been asserted in many cases by this court. Car Co. v. Parker, 100 Ind. 181; Story v. State, 99 Ind. 413; McDonel v. State, 90 Ind. 320; Short v. State, 63 Ind. 376; Beavers v. State, 58 Ind. 530. Counsel for the appellant, although they argue the question at length, cite only a single case, — that of Ihinger v. State, 53 Ind. 251; but, as shown in Car Co. v. Parker, *supra*, that case is not in point, for the reason that the only question decided arose upon an instruction. More nearly in point are the cases of Robinius v. State, 63 Ind. 235; Swigart v. State, 64 Ind. 598; and Bird v. State, 104 Ind. 384. But these cases form an exception to the general rule. In those cases the question was, whether the personal appearance of a party could be considered by a jury in determining a person's age, and it was held that it could not. These cases have been vigorously assailed by many writers and courts; but we do not feel it necessary to depart from them, for we think they are distinguishable from our other cases, as well as from the present case. As said of Robinius v. State, in one of our former cases, 'There is a distinction between such a case and the present, for where age is the material question, as it was in the case cited, the decision upon inspection really determines the whole question; while, in such a case as the present, the inspection of the wounded member simply illustrates and makes clear the testimony of the party, and assists in determining the character of one of the facts in the case.' Car Co. v. Parker, *supra*. To what was there said we may add that here the exhibition of the injured member affects only the extent and character of the injury, which is only a single fact in the case; while in a case where the decision depends upon the age of a party, the opinion of the jury upon inspection conclusively settles the whole question, thus effectually depriving the party aggrieved of the benefit of an appeal. But, in a case like this, the inspection of the injured part settles nothing more than the extent and character of the injury, if, indeed, it can be justly said to settle

so much. At most, then, an inspection of an injured limb does no more than supply evidence upon a single fact; and it does not deprive the party of any substantial right on appeal; for it is conclusively settled that the appellate court will not weigh the evidence in any case where there is a conflict. It is obvious, therefore, that the case under discussion is very different from one in which age decisively determines the whole controversy. It is evident that the learned counsel have expended much labor on this point; and, as they cite only the single case we have referred to, we may well infer that there are no others that lend any support to their position. We have ourselves given the subject very careful study, and our search has not revealed a solitary authority that opposes, directly or indirectly, the doctrine that it is competent to exhibit an injured limb to the jury. It certainly has always been the practice, as Mr. Chitty says, to exhibit models, articles of apparel, or other chattels; and the case before us is the same in principle."

Examination of Person by Order of Court. — See *International & G. N. R. Co. v. Underwood*, and note, 27 *Ib.* 240, 245.

CHICAGO, ROCK ISLAND, & PACIFIC R. CO.

v.

FELTON.

(*Illinois Supreme Court, June 16, 1888.*)

Passenger. — **Jumping from Train on hearing Danger Signal.** — A passenger is never required to understand and heed any signal given by the whistle of the locomotive engine; and where a passenger on a train which was stopped by a snow-bank saw the light of an approaching engine, which he and other passengers supposed was on the same track with them, and at the same time the engine of the train he was on gave certain sharp, keen whistles, which they took for signals of alarm, and he thereupon jumped from the train, and was caught in a snow-plough attached to the approaching engine, which was on another track, *held*, that, the whistle not being for passengers, the sounding was not negligence, and the company was not liable.

APPEAL from Appellate Court, Second District.

Action by Egbert W. Felton, administrator of Luke H. Goodrich, against the Chicago, Rock Island, & Pacific Railway Company for the death of his intestate. Judgment for plaintiff, and defendant appeals. Late on Saturday night of March 19, 1881, the Chicago, Rock Island, & Pacific Railway Company started a train, consisting of a sleeper, passenger-car, and baggage-car, to pass on its road from Bureau Junction to Chicago. There was at the time a violent storm of wind and snow, which had begun some twenty-four hours earlier. The storm had at some points so obstructed the railway track by drifting snow as to prevent the passage of cars; and all regular trains had, in consequence of

the storm, been much delayed. The train arrived at Ottawa near two o'clock in the morning of Sunday (the 20th), and at that place Luke H. Goodrich and William Maltby got in the passenger-car to go to Joliet. From Ottawa to Chicago there is a double track, being used, generally, that on the south side for trains passing east, and that on the north side for trains passing west. The train proceeded from Ottawa east, on the south track, to Morris, where House and Marshall, intending to go to Joliet, and perhaps others, entered the passenger-car. At Morris there was a snow-plough that had been passing eastwardly on the south track, but which had gotten off the track so far as to prevent present passage by that track; and on that account the train was there switched onto the north track, and it then passed on the eastwardly. About a mile west of Minooka, which is the next station east of Morris, the train ran into a snow-bank, which stopped its passage. Trains had passed on that track late on the evening before, and it is hence to be inferred that the obstructing snow-bank was piled up by the storm after that time. Whether Goodrich knew that the train had taken the north track, and left the snow-plough on the south track, at Morris, does not appear; but it does appear that Maltby, who got in the passenger-car with him at Ottawa, knew it, and that House and Marshall, who got in that car at Morris, knew it. Maltby testified, when recalled for further cross-examination, "I understood at Morris that our train switched off onto the other track. I think I got that understanding from the conductor in coming in the train. I understood that the snow-plough was off, at that time, on the other track; and I understood from the conductor that that was the reason we took the other track coming through." Maltby had previously said that Goodrich sat behind him in the car; he could not recollect whether one or two seats. House testified, "After I got aboard of the train, the train backed off, and switched over on the other track, and proceeded towards Chicago. That would be the north track, or left-hand track coming this way, and the right track going west. At that time the snow-plough was on the track up near the water-tank." Marshall testified, "I knew at Morris that this train was going to take the north track. I heard the conductor say so. I did not hear him aboard the train, but heard it before I got on board. I heard him talking about it to the engineer. I knew the snow-plough was off the track there, and it was on the track ahead, and would have to get on again. . . . I knew at Morris that if the snow-plough, which was the very one that subsequently passed us on the south track, got on the track, it was going to take the south track." Not long after the train was stopped by the snow-bank, House, who had been seated in the front end of the car, arose, and passed down the aisle, by

Goodrich and Maltby, to the rear end of the car, and thence out onto the steps at the rear end of the car. As he passed by Goodrich and Maltby, he attracted their attention by some remark, and they then both arose and followed him. House, when on the steps, looked by the sleeper to the rear, in the direction of Morris, and saw what he thought to be the head-light of an engine coming right into the rear end of the train. Goodrich preceded Maltby, and looked in the same direction in which House had looked; and Maltby, reaching over the shoulders of Goodrich, also looked in the same direction, and he saw what he supposed was an engine coming into the rear end of the train. House immediately turned, and re-entered the car. As he did so, he remarked, "My God! gentlemen, the snow-plough is coming into us." About the same time one of the engines in front of the passenger-train gave what Maltby, House, and Marshall understood to be a whistle of alarm. House testified, "They were sharp, quick whistles; . . . signals of danger." Maltby testified, "While standing on the platform, I heard the engines in front of our train whistling;" and, on being asked what sort of whistles they were, he answered, "Whistles of alarm." Marshall testified that he had got off the train on the south side after it stopped, and gone forward towards the engines; that he heard a remark, not loud enough, however, to have been heard by Goodrich, to the effect, "It's running into us," which caused him to turn around; that he looked back, and saw the head-light of the engine to which the snow-plough was attached; it looked as if it was coming directly into the train; that he then stepped up to the car to notify the conductor, and, as he did so, he heard from one of the engines a sort of sharp, quick signal, which he understood to be a danger signal. Marshall says there was one passenger, a young gentleman from Minooka, with him. There was also, besides, on the ground on the south side of the train, near the south track, a brakeman and some other train-men. There is no other evidence in regard to the whistle of the engine. There is nothing explaining its purpose, or the meaning of such a whistle, any further than has been quoted. Immediately after House re-entered the car, and after the whistle from the engine in front, Goodrich and Maltby jumped from the steps to the ground; intending, as Maltby testified, to cross to the bank south of the south track, but advancing parallel with, instead of directly across, the track. The evidence also shows that about the time, or perhaps a few moments earlier than, they jumped, some train-men rushed from near the engines to the bank south of the south track, and that this was observed by Maltby. There is no explanation of what induced them to do so, and it is not shown that either of them had any care over the passengers in the

train. The inference is, that they were seeking to avoid danger from the advancing snow-plough. Maltby and Goodrich, just after alighting, were caught by the snow-plough, which rushed by at a rapid speed, and Goodrich thereby received wounds of which he died on the Monday night next following. One of the witnesses describes the place where the obstructing snow-bank was as a "cut," but the depth is not stated. He described the snow as "banked up" on the north side of the track as high as the car, but said it was not very deep on the south side. The road curves, at a point a short distance west of the obstruction, to the south, and it is therefore impossible for a person looking from the point of obstruction westwardly to tell whether a car beyond the commencement of this curve is upon the one track or the other. Snow was falling, and a strong wind was blowing from the north or north-west at the time. The hour must have been not far from three o'clock in the morning. No one who remained in the passenger car was in any degree injured or even frightened. The snow-plough threw a large quantity of snow as it advanced; and this snow, falling against the windows, knocked in one or two, but it did no other injury. There is no evidence that any of the railroad employees had any knowledge of the existence of the snow-bank until the train ran into it, and there is no evidence that those in charge of the snow-plough knew that the train was delayed there until after they passed it.

The declaration contains two counts. The negligence alleged in the first is, that the servants of the defendant so negligently and carelessly managed "their locomotive engines, and the said snow-train and passenger train, that the said snow-plough, in passing with great velocity the passenger train, then standing on an adjoining track, ran upon, struck, and caught up the said Luke H. Goodrich, then and there being a passenger, . . . and while exercising due and reasonable care and prudence to avoid danger, and threw him . . . with great force and violence upon the ground, and against the side of one of the passenger cars," etc. The negligence is thus stated in the second: "And whereas, at the time and place aforesaid, the passenger train whereon the said Goodrich was a passenger was standing still upon the north or west-bound track, by reason of the obstructions of snow thereon, and in a cut which, by reason of a precipitous wall or bank of snow on the north side of said track, and closely approaching the same, made any escape from the cars in which said Goodrich was being conveyed, as aforesaid, impossible to a passenger therein, in case of occasion to attempt the same; and whereas, at the time and place aforesaid, while the said passenger train, which was bound east, was so standing upon said west-bound track, and the said Goodrich was so being conveyed as a

passenger therein, the said snow-train, or locomotive engine with snow-plough attached, coming from the west on the south or east-bound track, with great velocity, passed the place where said passenger train was standing, being for the time being obstructed by the snow ; and whereas, from the darkness of the night and falling snow the said Goodrich was unable to discern objects at a distance, and by reason of a curve in said railroad was unable to see whether said snow-train was approaching on the north or south track, and thereby becoming terrified and alarmed, as well by the apparent direction of approach of said snow-train as by the signal of danger sounded by the servants of said company by a prolonged blast from the whistle of one of said locomotive engines to which said passenger-train was attached, then and there sought to escape from the supposed danger of collision between said trains, by crossing over the south or west-bound track, — the said defendant, by its servants and agents, then and there so negligently, ignorantly, and unskilfully managed said engines, and with such want of concert and knowledge between the servants of said company managing said trains, respectively, that the said Goodrich was struck with great violence by said snow-plough, and was thrown and flung by the impetus of the same upon the ground, and upon and against the side of one of the cars forming said passenger-train, whereby he received mortal injuries to his person, because of which he afterwards, on the twenty-second day of March, 1881, died. That the said Goodrich, in leaving said passenger-car in the manner and at the time and place aforesaid, exercised reasonable care and diligence to apprehend and escape said apprehended and apparent danger of collision.

The court, at the instance of the plaintiff, gave the following, among other, instructions to the jury : “ If, from the evidence, the jury believe that the engineer in charge of one of the engines attached to the passenger train, either from ignorance of the character of the approaching train or any other cause, sounded signals of alarm, such as are usually given to avoid collision on the track, and that the effect of these signals of danger was to produce fright among the passengers, or some of them, besides the deceased, while within the passenger-car, and that immediately afterwards one or more of the employees of the defendant fled across the track with precipitation, followed by one or more of the passengers, as if to avoid danger, or in such a way as to naturally produce that impression on the mind of Goodrich, and that this conduct on the part of said engineer or other employees of the defendant, to the satisfaction of the jury, was the immediate and proximate cause of the effort of said Goodrich to seek safety in the same direction, if the jury believe from the evidence

he made such effort, such facts may be weighed, in conjunction with all the other evidence in the case, in determining the question of the alleged negligence on the part of the defendant, even though the jury may further believe from the evidence its employees were themselves deceived by a false and misleading appearance of danger."

Thomas F. Withrow, James C. Hutchins, and Snapp & Snapp for appellant.

G. D. A. Parks and C. W. Brown for appellee.

SCHOLFIELD, J. — Since the right of recovery here is based upon the negligence of the defendant, it is not sufficient merely that plaintiff's intestate became alarmed by reason of appearances produced wholly or in part by the defendant. It must appear that that which produced the alarm, and, through it, the injury, was negligence of the defendant. The burden is upon the plaintiff to prove this negligence; and that is not done by proof alone that a peculiar signal was given by an engine of the defendant, and that it caused or aggravated the alarm of the intestate. If the signal given was, under the circumstances, a proper one, it cannot have been negligence to give it. The instruction quoted in the preceding statement assumes that there is evidence before the jury tending to prove that the defendant's servants negligently gave an alarm signal by blowing an engine whistle. There is no such evidence in the record. As will be seen by reference to the facts in the preceding statement, the only evidence in regard to the blowing of an engine whistle is, that an alarm whistle was blown, or, as one phrases it, "a danger signal was given by the whistle. There is an entire absence of evidence of the purpose of giving signals by the whistle, for whom they are intended, and the results they are expected to produce; nor is there any evidence tending to show that the signal here was unnecessarily given. If we are left to take judicial knowledge of the purpose of giving signals by the whistle, then we know that they are not intended for the passenger on the train at all. They are for those operating the road, and to notify those who but for the signal might come in collision with the train, of its presence. Communications are ordinarily made with passengers, in regard to matters affecting them, personally by the conductor, more rarely by porters or other employees; but the passenger is never required to understand and heed any signal given by the whistle of the engine. No witness testifies, as this instruction assumes, that the signal given was such as is usually given "to avoid collision on the track." If those in charge of the engine apprehended injury to the cars, or to the other property of the company, or to the passengers

or train-men on or near the south track, by the too rapid movement of the snow-plough, it was not only prudent, but it was their duty, to give a danger or alarm signal by the whistle to those in charge of the snow-plough, so that they might moderate its speed; and since, from all the evidence, it is apparent that those in charge of the train knew that the snow-plough was on the south track, and hence that there could be no collision, it is much more reasonable to infer that this was its purpose than that it was to avoid a collision. It is not charged in the declaration that the train on which the plaintiff's intestate was riding was, through negligence, upon the north track, and there is no evidence tending to sustain such an allegation, had it been made; and it is clear, beyond all question, that the running into the snow-bank was the result of an inevitable casualty. It is not claimed that the curve in the road, the darkness of the night, or the violence of the storm, can be regarded as evidence tending to establish negligence; and hence the jury must have accepted the fact that the whistle blew an alarm as conclusive proof of negligence, and the giving of this instruction was therefore error. The judgments of the Circuit and the Appellate Courts are reversed, and the cause is remanded to the Circuit Court for a new trial. The clerk of this court will tax the costs made in the Appellate Court against the appellee, upon certificate of the amount to be filed by the clerk of the Appellate Court.

Injury caused to Passenger by leaping from Train under Apprehension of Collision. — The case of *Gulf, Colorado, & S. F. R. Co. v. Wallen*, 65 Tex. 568, s. c., 26 Am. & Eng. R. R. Cas. 219, is somewhat analogous to the principal case. In this case plaintiff and his wife were passengers on a train on defendant's road, which stopped between two stations, and remained standing for about an hour. While the train was so standing, another passenger called out, "Here comes a train right on us." Other passengers jumped to their feet, and scrambled to get out of the car-door. Plaintiff looked through the rear door and saw a freight-train coming toward the passenger-train, and about three hundred or four hundred yards off. He called to his wife, and both ran to the car platform and jumped to the ground. His wife was seriously injured. He did not look back again until he had reached the ground, when he saw the freight-train a hundred yards in the rear, having stopped. There was evidence to show that nearly all the passengers were frightened. There seemed to be a general panic, and many of the passengers jumped to the ground. The conductors of the two trains testified that there was no danger whatever of a collision, as the freight-train had been properly signalled as soon as it came in sight. Three of the passengers testified that they saw the freight-train coming, and apprehended no danger; that it seemed to be under control, and was running slowly. In an action by the plaintiff to recover damages for the injuries received by his wife in jumping off the train, it was held that the evidence would not sustain a verdict for the plaintiff, and the defendant could not be held guilty of any act of negligence contributing to the injury of plaintiff's wife.

STAGER

v.

RIDGE AVENUE PASSENGER R. CO.

(Pennsylvania Supreme Court, Feb. 27, 1888.)

Passenger. — Boarding Moving Street-Car. — Contributory Negligence. — It is not contributory negligence *per se* for a passenger to board a street-car by the front platform, when the car is moving at such a slow rate of speed that a person of reasonable prudence, in the exercise of ordinary care, would not hesitate to attempt to board it; but the question is for the jury to determine on all the evidence.

Same. — Burden of proving Negligence on Passenger. — Nonsuit. — Where a passenger is injured while attempting to get on a moving street-car, it is incumbent on such passenger to show positive negligence on the part of the company or its servants before he can recover damages; and unless he can show such positive negligence, the trial court will properly direct a judgment of nonsuit.

ERROR to Court of Common Pleas, Philadelphia County.

This is an action for damages for the death of Harry W. Stager, prosecuted by his administrator, Theodore H. Stager, against the Ridge Avenue Passenger Railway Company, although begun by the intestate during the short interval between the accident and his death. The accident occurred on Monday, Jan. 7, 1884. On that day, Harry W. Stager, a boy seventeen years of age, was standing on the west side of Fifteenth Street and south side of Ridge (where these two streets intersect each other), and signalled to the driver of a car of defendant company (running south-eastwardly) to stop. The driver slackened up almost to a stop, so that "any one could get on handy." Stager then got on the car by way of the front platform. He had hold of both handles of the car, had one foot on, was just putting on his other foot, when there was a jerk, he fell, and the car-wheels passed over his legs. On the trial there was no direct evidence respecting the cause of the jerk, although the plaintiff claimed that it was caused by the driver removing the brake and whipping up the horses. The trial court, upon motion of defendant, after plaintiff's testimony had been adduced, directed a nonsuit. Plaintiff appeals.

John Scollay for plaintiff in error.

J. Howard Gendell for defendant in error.

CLARK, J. — This suit was brought by Harry W. Stager, in his lifetime, to recover damages for a personal injury, which, it is alleged, he sustained through the negligence of the company's servants, on the 7th January, 1884, which injury resulted in his death. The administrator of his estate has been substituted in the action, and the cause came to trial upon an issue formed between the plaintiff's legal representative and the company.

Facts.

It is admitted that Stager attempted to board the car, at the front platform, while the car was in motion. He succeeded in getting on the lower step with one foot only; and, before he could establish himself there, a sudden motion of the car forward threw him off, and he fell under the wheels. It is not definitely shown at what rate the car was moving at the time of the occurrence. Stager had given the conductor a signal to stop, and, as the car approached the crossing, it "slowed up;" but before it had fully arrived at the place where the stop was to be made, and while it was still in motion, he attempted to enter by the front platform, with the result stated. The evidence seems to show that the car was moving quite slowly, but it did not stop.

We are not prepared to say, as matter of law, that the attempt of a passenger to board a street-car while it is in motion is to be considered an act of negligence, no matter what may be its rate of speed. A car may be moving so slowly that there would be no apparent danger whatever in attempting to enter it; so slowly that a person of reasonable prudence, in the exercise of ordinary care, would not hesitate to make the effort. It would be a hard rule that would hold a passenger guilty of culpable contributory negligence in such a case. In all cases of doubt, the question must be left to the jury to say, under all the circumstances, whether the danger of boarding the train when in motion was so apparent as to have made it the duty of the plaintiff to desist from the attempt. *Johnson v. Railroad Co.*, 70 Pa. St. 357. Nor can we say that the act of entering the car by the front platform, when the car was in motion, regardless of its rate of speed, was an act of negligence *per se*. Passengers generally entered the cars of this company by the rear platform, but it seems, although there was no invitation to do so, they were permitted to enter on the first platform also: there was no known rule of the company against it. The fact that the attempt was made at the front platform is undoubtedly a circumstance to be considered in connection with the fact that the car was at the time in motion; yet we are not clear that either one of these circumstances, or both of them together, can, as matter of law, be held to constitute negligence. There are cases, of

Boarding moving street-car not contributory negligence *per se*.

course, where the act of jumping either on or off a rapidly moving car may be said to be negligence *per se*, as in *Railroad Co. v. Aspell*, 23 Pa. St. 147, and *McClintock v. Railroad Co.*, 42 Leg. Int. 82; but in a case like this, where a street-car is said to have "slowed up slow," as it usually does for a man to get on, "so that any one could get on handy," etc., the question becomes one of doubt, a definite sentence cannot well be pronounced upon it, and the question becomes one for the jury, upon a full consideration of the whole case, to determine the fact of negligence. But the plaintiff, in order to recover, must show that the personal injury received by Harry W. Stager was the result of some act of negligence on the part of the company or its servants. The

**Burden of
proving posi-
tive negligence
on plaintiff.**

mere fact of the injury, under the circumstances of this case, is not enough: the injury was received before the passenger had placed himself in the carrier's hands. It is only when the injury occurs from agencies peculiarly within the defendant's power that they can be presumed without proof to have acted negligently. Whart. Neg. sect. 661. The burden of proof rested with the plaintiff; and, unless some act of negligence on part of the company or its servants is shown, the cause of action is not made out. It is said, that, when Stager landed upon the first step of the car, there was a sudden start or jerk, which threw him off, and that the injury resulted from this rather than from his attempt to get on the car while it was still in motion. But it has not been shown that this sudden movement of the car was in any way attributable to the driver. It is suggested that he may have removed the brake, or applied the whip; but there is not the slightest proof that he did either. Stager was on the step, at the side of the driver, and he does not pretend to say that the driver did any thing to produce this result. It was a cold morning in January; the track was probably covered with ice; the horses may have been impatient from the cold; and the quick motion of the car forward might just as well be attributed to either or both of these causes as to the action of the driver. The truth is, however, that there is not the slightest proof on the subject, there was nothing in the evidence from which any well-founded inference could be drawn as to which of the several causes mentioned the sudden motion of the car was to be attributed, and it is plain that the jury would not be justified in determining the fact from mere conjecture. Facts are for the consideration of the jury only when there are facts to consider; and neither the court nor the jury, in such a case, was justified in making a guess as to the cause of the sudden starting of the car.

In this aspect of the case, it is unnecessary for us to decide what would have been the measure of the plaintiff's recovery in

view of the fact that the father has also brought an action to recover damages for the death of his son, under the Act of 26th of April, 1885. We are of opinion that the learned court below was right, upon the grounds stated in this opinion, in entering the nonsuit, and therefore the judgment is affirmed.

Contributory Negligence in boarding Moving Cars. — See next case, and note.

GULF, COLORADO, & SANTA FE R. CO.

v.

Fox.

(*Texas Supreme Court, Nov. 8, 1887.*)

Passenger. — Dangerous Platform. — Negligence in Constructing. — Question for Jury. — It is a question of fact for the jury whether the construction of an unusually high depot platform, the edge of which is four feet from the platform of a car, is dangerous or not.

Failure to allow Reasonable Time to procure Tickets is Negligence. — The failure of a railroad company to allow passengers a reasonable time, after the opening of a ticket-office, for the purchase of tickets and boarding the cars, is negligence.

Starting Train while Passenger is attempting to get on. — Negligent Delay of Passenger. — A railway company is liable to a passenger who sustains injuries caused by the officer in charge of a train putting it in motion, knowing that such passenger is in the act of getting on board, although such person negligently remained in the waiting-room after being notified to board the train.

Care imposed by Knowledge of Defects in Platform. — A person who is acquainted with the peculiar construction of the platform at a railway station does not have imposed upon him the necessity for a greater degree of caution than is incumbent upon all parties boarding a car.

Instruction calling Attention to Height of Platform. — When Immaterial. — In an action to recover damages sustained by falling from a platform while boarding a railroad-car, the charge to the jury called attention to the height of the platform as an element of danger, although the evidence did not show that the height in any way contributed to the accident. *Held*, not material, as the jury were not misled.

Misconduct of Counsel in addressing Jury. — Where jury appear to be uninfluenced by an improper appeal made by counsel in addressing them regarding matter outside of the record, the misconduct is immaterial.

Evidence. — Opinion. — Where a witness testified that, before the trial, plaintiff told him that if he would tell the truth about the matter he would not lose any thing, such witness should not be permitted to state that he understood this to be a hint to testify in plaintiff's favor, such evidence being merely an opinion, and the proper meaning of the expression being for the jury.

COMMISSIONERS' decision. Appeal from District Court, Johnson County; J. M. Hall, Judge.

This was an action brought by Calvin P. Fox against the Gulf, Colorado, & Santa Fe Railroad Company for personal injuries

sustained by his wife, Lucy A. Fox, owing to a fall from defendant's platform while boarding a car. Judgment for plaintiff. Defendant appealed.

Tillman Smith for appellant.

Crane & Ramsey and *George D. Green* for appellee.

MALTBIE, P. J. — This was a suit to recover damages for injuries alleged to have been inflicted on Lucy A. Fox, wife of appellee, Calvin P. Fox, at Fort Worth, on the sixteenth day of

Facts.

April, 1884, by appellant, who was a carrier of passengers over its railway from Fort Worth to Cleburne. It was alleged and proved that appellant had posted notices in its waiting-room at Fort Worth that persons procuring tickets would be charged at the rate of three cents a mile over its road, and persons not purchasing would be charged four cents a mile. It was claimed by appellee, that on the day and year above stated, he, in company with his wife, went to appellant's depot at Fort Worth to buy tickets to Cleburne; that they arrived before the ticket-office was opened; that it was only opened a short time before the train started to Cleburne; that as soon as it was opened, and appellee and his wife could get tickets, he and his wife went immediately to the cars to take passage; that the approach to the cars was over a platform four or five feet high; that it was on a level with the platform of the cars, and two feet higher than the lowest step of the car; that, upon reaching the cars, appellee's wife attempted to step from the platform to a step of the car, for the purpose of entering the train; that, just as she was making the step, the train started with a quick, sudden jerk, no notice or warning having been previously given; and that she fell down, between the step of the car and the platform, falling apparently under the car, her back striking the cross-ties or rail with great force; that appellee held to her arm, he being on the platform of the car; and that she was thus dragged along for a distance of 8 or 10 feet, when the car stopped, a signal having been given by some one for the purpose; that she was then assisted into the car, and was carried to Cleburne; that she received a severe shock from said fall; that her hip and back were bruised and blackened thereby; that she was pregnant at the time, and a miscarriage resulted; that she suffered great pain; that her health had thereby been permanently injured to such an extent that she had not been able to attend to any of her household duties up to the trial, a period of eighteen months from the time of the alleged injury; that appellee and his wife were without fault or negligence; and, as a consequence, had sustained damages in the sum of \$10,000. To the petition appellant filed general and special exceptions, pleaded the general denial, and contributory negligence.

The court overruled the exceptions, of which complaint is made ; but, as the petition states a good cause of action, it will be necessary to notice the first and second special exceptions, which are, in substance, that, *first*, the fact relied on to constitute negligence in the construction of the platform — being that the platform is four feet high, on a level with the platform of the car, and two feet higher than the lowest step of the car, and, as a consequence, the platform was dangerous — is sufficient to show negligence. It not being shown but that persons could easily and safely step off of the platform onto the highest step of the car, said exception should have been sustained ; but, there being other facts stated sufficient of themselves to authorize a recovery, the error becomes immaterial.

Negligence in construction of platform a question for jury.

The *second* exception was to that portion of the petition that charges defendant with failing to put tickets on sale a reasonable time before the departure of the train, because it does not show negligence. The petition charged that appellant made a difference of one cent a mile in favor of persons who bought tickets, and had posted notices to that effect ; and that appellee and wife went to appellant's office to buy tickets, arriving before it was opened, and bought tickets as soon as it was opened, and went immediately to the train to take passage ; and said Lucy was hurt in attempting to board the train without fault on their part. The laws of the State require a railroad company to open its ticket-office at least thirty minutes before the departure of its trains. Gen. Law 1883, p. 70, sect. 9. Persons desiring to purchase tickets, in the absence of notice to the contrary, might rely on the presumption that the railway company would obey the law, or that it would, at all events, allow a reasonable time for persons to buy tickets and board its trains in safety, after the opening of the ticket-office ; and a failure to do so, resulting in injury, would constitute negligence. The fact that the petition may have further charged that a sufficient time to check baggage was not allowed, could not vitiate the above allegations, though it was not averred that the persons had baggage to check.

Negligence in not allowing reasonable time to procure tickets.

Evidence was introduced by appellant on the trial tending to show that appellee and wife purchased tickets in ample time to have boarded the train in safety before the accident occurred ; that they were notified to go aboard the train after they had purchased their tickets, and that, instead of doing so, they loitered in the sitting-room for five minutes or more before they started to the car ; but there was no evidence that they halted after they started from the sitting-room until they reached the car. There

Negligence of plaintiff in attempting to board train.

was evidence that all the other passengers were seated before the accident occurred, and also evidence tending to show, that the train was in motion, or just starting, at the time appellee's wife attempted to enter the car. It is objected by appellant, that the court erred in the first part of the charge in not informing the jury that if appellee and wife were acquainted with the construction of the platform, a greater degree of caution would be necessary than if they were not; also in assuming that the car started with a sudden jerk, and in not informing the jury that appellee could not recover if the train was in motion when she attempted to get on it. We are of opinion that Mrs. Fox was required to use such caution as a person of ordinary prudence would use in approaching the car, and the fact that she was acquainted with the construction of the platform could not impose any greater degree of caution upon her. Nor do we think the charge susceptible of the construction that the court assumed that the car started with a sudden jerk. It is a cardinal rule in the construction of written instruments that the whole instrument must be taken together, for the obvious reason that it is often impossible that the whole subject-matter of the writing should be embodied in a sentence, or even a paragraph. In a subsequent paragraph the court instructed the jury that if the said Lucy attempted to enter the train while it was in motion, plaintiff could not recover. The second paragraph of the charge is also objected to, a part of which is as follows: "If you further find from the height of said platform that it was dangerous for persons to attempt to enter the cars of defendant from said platform; if you find she made such an attempt, and she at such time used such care and caution as a person of ordinary prudence would use under like circumstances; and from the height of said platform, and from the starting of defendant's train, while she was attempting to enter the same, that she was thrown from said platform and train upon the ground," etc. If the record contains a correct copy of the charge, it must be conceded that it is very confused, and not calculated to enlighten the jury. It is also objectionable in calling the attention of the jury to the fact that the height of the platform might be an element of danger in attempting to board the train. There was no evidence tending to show that the height of the platform in any way contributed to the accident; the most that could be said is, that the height of the platform likely caused Mrs. Fox to strike the ground harder than she would have done had it been lower. Still, under the facts of the case, we do not think that the jury were misled by the charge; the evidence on behalf of appellee clearly showing that he was entitled to recover without reference to whether the platform was safely constructed, and the evidence on behalf of

appellant clearly showing that the accident was the result of appellee's negligence, without reference to the platform.

Appellant requested the court to give a number of charges relating to the plaintiff, and the acts of the said Lucy, from the time they came to the waiting-room till the accident occurred, all to the effect, under different phases of the evidence, that if plaintiff or his wife was guilty of negligence contributing to the injury, he could not recover. We are of opinion that the attention of the jury was sufficiently called to the different views presented by the evidence in the general charge of the court, and that, under repeated decisions of our Supreme Court, the special charges were properly refused.

Objections are also urged to the third and fourth paragraphs of the charge, because not presenting the theory that plaintiff and wife may have loitered elsewhere than in the sitting-room, and because the theory was only presented as to alleged acts of negligence that occurred after the purchase of tickets, when in fact acts of negligence may have occurred before the tickets were purchased; second, because of that portion of the charge to the effect that defendant's agents must not have seen that said Lucy was in the act of entering the train, because the knowledge on the part of the agents is not confined to any particular time, and because the charge imposed a burden on defendant not imposed by law, and thus misleading, and did mislead the jury. In reference to the first objection, the inflexible rule is, that the charge of the court should be framed so as to clearly present the issues made by the evidence to the jury, and be confined to the facts proven. There was no evidence tending to prove that appellee or his wife was guilty of negligence until after the tickets were purchased, and then it all tended to show that they remained in the waiting-room: no witness saw them anywhere else until they arrived at the train. The court was right in not entering upon a field of speculation as to the acts and movements of the parties not warranted by testimony. The court charged the jury, among other things, that defendant would not be liable if said Lucy attempted to enter said train, and, while so doing, the train was started by defendant's employees without their knowing that she was attempting to get on the train. We think that the time that defendant's employees should have had knowledge of the act of the said Lucy is sufficiently indicated in the instruction; to wit, at the time she was attempting to enter the train, and before it started. If the said Lucy was guilty of negligence in attempting to enter the train, by reason of having waited too long after being notified to board it, and yet if the person in charge of the train discovered her while attempting to enter it, and put the

Same.
The court's
instructions.

train in motion, knowing she was in the act of boarding it at the time, appellant would be liable in damages for the injuries thus inflicted. A human being does not forfeit the right to live on account of being negligent. *Railroad Co. v. Weisen*, 65 Tex. 443.

Appellant further insists that there was error in sustaining objections to a portion of the answer of the witness Hatcher, who stated appellee told him that he was going to sue appellant for \$10,000, and if witness would tell the truth about the accident he would not lose any thing; the witness offering to state he understood this to be a hint to testify in plaintiff's favor, which was objected to as being the opinion of the witness, and the objection was sustained by the court. In this there was no error. The jury were the proper judges of the meaning of the language used.

A bill of exceptions was also taken to certain remarks of plaintiff's counsel in his closing address to the jury, as follows: "I tell you, gentlemen of the jury, that ten thousand dollars is no money for the plaintiff in this case. Here he is, without money and without friends; in this his day of adversity you should come to his aid." If it was not morally certain from the verdict in this case that these remarks did not influence the jury in any degree, we would have no hesitation in reversing the judgment. However little calculated to accomplish the object intended, appeals to things outside of the record should never be tolerated in a court of justice; but being fully satisfied, that, if appellee was entitled to recover, the verdict is not excessive, it should not be disturbed on the sole ground that an attorney may have made an improper and unprofessional appeal to the jury. Upon the whole, we are of opinion that the judgment should be affirmed.

WILLIE, C. J. — Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

ON REHEARING.

(Dec. 13, 1887.)

GAINES, J. — Upon the motion for a rehearing in this cause, we have carefully reconsidered the cause as shown by the record, and have determined to modify our previous order approving the opinion of the commissioners of appeals as an entirety, so as to adopt merely their conclusions that the judgment should be affirmed. The first proposition in support of the motion is to the effect that if there was error in overruling the exception to so

Negligence in
construction
of platform.
Pleading.

Evidence.
Opinion.

Misconduct
of counsel.

much of the petition as set up the faulty construction of defendant's platform, this error was calculated to prejudice the rights of defendant, and should have worked a reversal of the judgment. But, upon an examination of the petition, we find the allegation to be, that the platform was improperly and negligently constructed in this: that the floor of said platform is very high, and on a level with the floor of defendant's cars, and about two feet higher than the lowest step on which defendant's cars are entered, and that the distance from the edge of said station platform to the platform from which passengers enter the door of defendant's cars is about four feet, by which negligent construction of said platform it is very difficult, and somewhat dangerous, to attempt to enter said cars at said place. We do not know, as a matter of law, that all persons could with safety either step down two feet to reach the step, or could leap with safety the intervening space, as would be required of some, if they sought to pass directly from the one platform to the other. We think it a question of fact whether such construction was dangerous or not, and that, having been alleged to be dangerous, the demurrer to this part of the petition was properly overruled. A leading text-writer on the law of negligence says, "A pleading must state facts; and if it avers conclusions of law, it is to that extent bad. It does not follow, however, that because negligence is a mixed question of law and fact, a general allegation of negligence is pleading a leading conclusion only." 2 Thomp. Neg. p. 1245, sect. 24. The Supreme Court of Iowa also say, "The facts necessary to be pleaded are not merely physical facts. It is not allowable to plead mere abstractions of law: having no element of fact, they form no part of the allegations containing a cause of action; but if they contain elements of a fact, construing language in its ordinary meaning, then force and effect must be given them as allegations of facts." *Grinde v. Railway Co.*, 42 Iowa, 376. See also *Hoffman v. Water Co.*, 10 Cal. 413; *Railroad Co. v. Chenoweth*, 30 Ind. 366; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Oldfield v. Railroad Co.*, 14 N. Y. 310. Here the physical facts are stated, and it is averred that they make the platform dangerous to passengers entering the cars; and although we may not say that these facts, as a matter of law, show a faulty construction of the platform, they are sufficient to authorize the jury, in the exercise of their knowledge and experience as applied to such matters, to deduce the conclusion that to pass from one platform to the other by the means provided was not unattended with danger. We think, therefore, the former opinion conceded too much to appellant, and that the court below did not err in overruling the exception to the petition. The error being conceded, the position taken by counsel for appellant in the motion is a strong one.

But, there being no error, the premise fails, and with it the argument that is based upon it. It is apparent from what we have said, that, in our opinion, the court below did not err in the charge which is complained of in the second ground of the motion. The charge was applicable to the pleadings and evidence bearing upon the question of the dangerous character of the platform, and correctly stated the law as applicable to the issue made upon it. Upon the other questions presented in the motion, we think the opinion adopted by this court correct, for the reasons therein given, and that it will subserve no good purpose to repeat them here. The evidence, though conflicting on many of the material issues in the case, was amply sufficient to sustain the verdict; the charge, considered as a whole, was favorable to the defendant; and we find no error in the record to its prejudice.

The rehearing will therefore be refused, and the judgment of affirmance permitted to stand; but the order heretofore made adopting the opinion reported by the commissioners will be set aside, and an order entered adopting their conclusions only.

Injuries to Passengers caused by Defective Platforms. — See *Reed v. Richmond & A. R. Co.*, and note, *ante*, 503.

Boarding Moving Train is not per se Contributory Negligence. — It is not negligence *per se* for a passenger to attempt to enter a train moving very slowly, but the question must be determined in view of all the circumstances. *Baltimore & O. R. Co. v. Kane* (Md.), 12 Cent. Rep. 95.

Burden of proving Contributory Negligence on Part of Passenger injured by Train starting while he is Attempting to get on is on Company. — Where plaintiff sued a railroad company for injuries caused by the negligence of the defendant in allowing a train to start while she was trying to get on, the burden of proof as to contributory negligence on the part of the plaintiff is on the defendant, and does not shift to the plaintiff when it is shown that she had gone close to the train to be ready to board it, and when notified by a brakeman to get on, and that she would have plenty of time, attempted to do so. *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370.

Contributory Negligence in Attempting to board Street-Car when another Car is Coming. — In an action for personal injuries occurring while plaintiff was attempting to board a street-car, the court charged that if he "started to get on the one car when the other car was coming [and one of the witnesses says he had to turn out of his course a little, because the horses hesitated a moment, or stood still], and that choosing between the risks, when the cars were so near together, he was caught between the two cars, and was hurt; now, if that was the way it happened, as I should suppose you would infer from the testimony of these witnesses, if the plaintiff did take the risks, he must suffer the consequences. . . . A man cannot take such risks with passenger railway cars, and then, if he gets hurt, ask the company to pay him damages." *Held*, no error. *Rose v. West Phila. R. Co.* (Pa.), 12 Antic Rep. 78.

Not Contributory Negligence per se to enter Train stopped at Place other than Station Platform. — Although a railroad company may have provided a station platform for entrance to and egress from its cars, yet it is not contributory negligence *per se* for a passenger to attempt to enter a train stopped at a place other than such station platform, in the absence of notice that passengers will be received only at the platform, and of a prohibition from attempting

to enter the cars at any other point. *Baltimore & O. R. Co. v. Kane* (Md.), 12 Cent. Rep. 95.

Passenger directed by Officer to enter Train away from Platform can recover for Injury received. — Where a passenger is directed, by one justifiably supposed by him to be an officer of the railroad company, to enter a train away from the platform, and does thereupon enter the train at the place directed, the company will be answerable for a consequent accident happening from its negligence. *Baltimore & Ohio R. Co. v. Kane* (Md.), 12 Cent. Rep. 95.

Passenger getting off at Water-Tank at Night. — Plaintiff, a passenger on defendant's train, at midnight got off the train at a water-tank, and, in attempting to get off, was run over. *Held*, that the court should have charged that if it was not a regular passenger station, and defendant's servants in charge of the train knew that no passenger was to get on or off there that night, and did not know that plaintiff got off, it was for the jury to determine whether defendant was guilty of negligence which was the proximate cause of plaintiff's injury, and also should have defined "proximate cause." *Galveston, H. & S. A. R. Co. v. Cooper* (Tex.), 8 S. W. Rep. 68.

Passenger may suppose Person in Uniform giving him Directions is Officer of Company. — Evidence that a person in the uniform of the railroad company said to a passenger, "We have telegraphed for an extra train," and then invited the passenger into the waiting-room, and when a train came near the station, but stopped at a place other than the platform, told the passenger that was his train, and directed him to go and take it, is sufficient *prima facie* to warrant the passenger in supposing that such person was an officer of the company, and will impose upon the company the burden of disproving such evidence. *Baltimore & O. R. Co. v. Kane* (Md.), 12 Cent. Rep. 95.

BUTLER

v.

MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE R. CO.

(*Law Reports*, 21 Q. B. Div. 207.)

Passenger. — Removal from Carriage for Failure to produce Ticket. — The plaintiff was a passenger by the defendants' railway. The ticket issued to him incorporated by reference certain conditions published in the defendants' time-tables, one of which was, that every passenger should show and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose; and any passenger travelling without a ticket, or failing or refusing to show or deliver up such ticket as aforesaid, should be required to pay the fare from the station whence the train originally started. The plaintiff, having lost the ticket, was unable to produce it when required to do so during the journey by one of the defendants' servants. The plaintiff was thereupon required to pay the fare from the station whence the train had started, and, on his declining to do so, was forcibly removed by the defendants' servants from the carriage in which he was travelling; no more force, however, being used than was necessary for his removal. He thereupon sued the defendants for assault.

Held, that the contract between the plaintiff and the defendants did not by implication authorize the defendants to remove the plaintiff from the carriage on his failing to produce a ticket, and refusing to pay the fare as provided by the condition; that the defendants were not justified in so removing him; and that the action was therefore maintainable.

APPEAL from the judgment of Manisty, J., at the trial of an action for assault.

The facts were, so far as material, as follows: The plaintiff was a passenger by the defendants' railway. He had taken a return ticket for a journey by an excursion-train from Sheffield to Manchester and back. The ticket issued to him had upon it the words, "subject to the conditions contained in the company's time-tables and advertisements." In the time-tables issued by the defendants were published certain by-laws and regulations, headed "By-laws and regulations made by the company with the approval of the board of trade for regulating the travelling upon and using the railways belonging to the said company," and which were stated to be made under the seal of the company, and approved by the board of trade. One of such regulations was to the following effect: No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." Certain of the other by-laws and regulations expressly provided for the removal of passengers from the company's carriages and premises; e.g., those with regard to persons intoxicated, or using obscene and abusive language, or smoking in carriages not specially provided for that purpose.

The plaintiff gave up the outward half of his ticket at Manchester, and on his return journey was required at Wadsley Bridge station, a mile out of Sheffield, to produce his ticket, but was unable to do so, having lost the return half of the ticket. The ticket collector required him to pay the ordinary third-class fare from Manchester, which he declined to do. The company's servants refused to allow him to proceed without paying such fare, although he offered his name and address; and, as he would not alight from the carriage, he was removed therefrom by force. He thereupon sued the company for assault. The jury found that no more force had been used in removing him than was necessary for the purpose, and assessed the damages at 25/. It

was agreed that the learned judge should decide all questions of fact other than the questions as to whether there had been an excess of force used, and as to the amount of the damages. The learned judge gave judgment for the defendants, holding it to be an implied term of the contract that, if the passenger failed to produce his ticket, his right to be carried ceased, and that he might be removed from the carriage.

Waddy, Q. C., and Lawson Walton, for the plaintiff.

Lockwood, Q. C., and Cyril Dodd, for the defendants.

LORD ESHER, M. R. — In this case the plaintiff, who was a passenger by the defendants' railway, had paid for a ticket, but had lost it. At a certain stage of the journey he was asked to produce his ticket, and, not being able to do so, was told that he must pay the ordinary third-class fare from Manchester to Sheffield. He refused to do so, and thereupon the defendants' servants assumed the power of pulling the plaintiff forcibly out of the railway carriage in which he was travelling. The plaintiff brings an action of assault against the defendants for this act of their servants; and the defendants assert that they were justified in removing the plaintiff from their carriage by force, using no more force than was necessary for the purpose of overcoming his resistance. The defendants put it that the plaintiff was unlawfully upon their premises, and it is admitted that the allegation that he was so is material to their defence. The question, therefore, is, whether it is true that he was unlawfully on their premises. I do not think that is made out. What is the nature of the relation between the plaintiff and the defendants? It is, as it appears to me, a contractual relation. It was alleged that the contract was for a right to go on the defendants' land in the nature of an easement; but that, there being no grant of an easement under seal, there was only a license given by the defendants to go on their premises, which they could revoke. All I will say with regard to that contention is, that, though it may have been quite right for the defendants' counsel to suggest the point, it seems to me when considered to be contrary to good sense. To say that a passenger by railway from London to Liverpool is to have an easement all over the line between those places, seems to me really ridiculous; and the absurdity of such a view of the case becomes greater when we remember that companies often contract to convey passengers over the lines of other companies. It seems to me, therefore, that the considerations upon which the case of *Wood v. Leadbitter* (13 M. & W. 838) turned are not applicable in this case. The contract between the plaintiff and the defendants really is, that,

Facts.

**Nature of
relation
between
plaintiff and
defendants.**

on his paying the fare for the journey, they will carry him in their carriage on the journey for which he has so paid the fare, using due care for his safety while so doing. That contract may be subject to conditions by reason of notice given to that effect upon the ticket incorporating such conditions. In this case it is said that the ticket referred to certain conditions, and thereby incorporated them into the contract. The only conditions which can be alleged to be so incorporated into this contract are the by-laws and regulations which the company made in pursuance of the authority given them for that purpose by statute. They can only make by-laws and regulations in pursuance of their statutory power, and accordingly we find that they assumed to make certain by-laws and regulations as required under the Railways Clauses Consolidation Act, 1845; viz., under the seal of the company, and with the approval of the board of trade; and such regulations are the only conditions which can be looked on as incorporated by reference by this ticket. One of such by-laws and regulations provides that "every passenger shall show and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose; and any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." I do not think it is necessary for the purposes of this case to discuss the question whether that is a valid or reasonable regulation, or how far the plaintiff would be bound by it if unreasonable. It would seem, if the decision in *Saunders v. South-eastern Ry. Co.*, 5 Q. B. D. 456, be correct, not to be reasonable. Whenever it becomes necessary, we must deal with that question; but I think we may, for the present purpose, assume that the condition is reasonable. The effect of it is, that the passenger is under an obligation to show his ticket when asked to do so, and, if he fails to do so, a certain consequence is to follow; viz., that he must pay the fare from the station whence the train started. But suppose that he refuses to do so: he no doubt breaks his contract; but does it result that the company's servants may lay hands on him, and remove him from the carriage? I do not think that it does. The remedy is by proceeding against him for the amount of the fare he refuses to pay. Where is there any contract by which he has agreed that, if he fails to show a ticket or to pay the fare mentioned in the regulation, the company may lay hands on him, and put him out of the carriage by force? No one has any right to lay hands forcibly on a man in the absence of some

Contract with
passenger.
Incorporating
condition into
contract.

No right to
remove
passenger for
failure to
produce ticket.

legal authority to do so, or some agreement to that effect. It is argued that such a right on the part of the company must be implied; but no court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both the parties, and I cannot agree with the learned judge in the court below in holding that such a term should be implied. For these reasons, I think his decision was wrong, and that the appeal should be allowed, and judgment entered for the plaintiff.

LINDLEY, L. J. — I am of the same opinion. The question raised by this case is one of great importance, both to the company and the passenger. One knows that railway companies may be placed in great difficulty by the unscrupulous attempts of fraudulent persons to cheat them; and I do not desire to express any opinion, one way or the other, on the question whether or not some condition might be made which, if properly worded, would justify the company in future in taking the course they claimed to take in the present case. There does not seem to me to be any by-law or regulation in this case which authorized the company to remove from their carriage a passenger who failed to produce his ticket. That consideration seems to be the key to the whole case. How can the company justify laying hands on the plaintiff? The plaintiff had taken his ticket, and the effect was, that there was a contract by the company to carry him to Manchester and back. There is no authority as yet to the effect that such a contract of carriage is a contract for an interest in land. It seems to me to be a totally different thing from a contract for an interest in land, and it seems to me absurd to treat the case as one of a revocable license. It is a case of a contract for carriage. The doctrine of *Wood v. Leadbitter* (13 M. & W. 838) does not appear to me to be at all applicable to the case of such a contract. Supposing that the contract of carriage involved a contract for production of the ticket or payment of another fare, and the plaintiff broke that part of the contract: does it follow as a matter of law that the defendants could turn him out of the carriage? The remedy is to take proceedings for the breach of contract on his part. It is argued that, having broken the contract, he was no longer lawfully on the defendants' premises. I do not see that that consequence follows. It does not appear to me that the contract between the plaintiff and the defendants was cancelled by reason of the plaintiff's breach of contract. In my opinion, the defendants failed to show that the plaintiff was unlawfully upon their premises, and therefore they had no right to remove him there-

Importance of
question
raised.

No right to
remove
plaintiff by
force of arms.

from by force. For these reasons I agree that the appeal should be allowed.

LOPES, L. J. — It is somewhat extraordinary that there should be no authority on such an important point as that raised in the present case. To my mind the case is very clear. In the first place, it is to be observed that there is no by-law or regulation which can be relied on as protecting the defendants in respect of what their servants did in this case. Whether any regulation could be framed which would do so, I doubt; but it is unnecessary to express any opinion as to that, because there is no such by-law or regulation in this case. That being so, the question is whether the company's servants were justified, in the absence of any such by-law or regulation, in laying hands on the plaintiff as they did. The plaintiff had admittedly properly taken his ticket for the journey from Sheffield to Manchester and back, and had paid the full fare for the journey, and admittedly he had lost his ticket accidentally. The effect is, to my mind, that he was lawfully in the defendants' carriage. It seems to me sufficient to state so much to show that the defendants were not justified in assaulting him as they did. It is argued that there was a breach by him of an implied contract. I find it difficult to understand what the nature of the suggested implication could be, unless it were to the effect that he agreed or consented, that, if he lost his ticket, the company should be authorized to lay hands on him and remove him from their carriage. I see no evidence whatever of any contract of that kind. If there were any breach of contract by him, it seems to me clear that they were not entitled to lay hands on him, but that their remedy would be by proceeding for the amount of the fare which he refused to pay. The case of *Wood v. Leadbitter* (13 M. & W. 833) was relied upon by the counsel for the defendants; but I do not think that the principles enunciated in that case have any application to the present. The question there was as to the right to go upon land. The present case is one of a contract to carry with reasonable care, and has nothing to do with land or any easement over or license to go upon land. It does not appear to me that any question as to the revocability or otherwise of a license arises. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Validity of Rule requiring Ejectment from Train of Passengers who refuse to produce Ticket or pay Fare. — The English Court of Appeal in the principal case declined to pass upon the validity of such a regulation, but upon the whole were inclined to doubt it (see especially judgment of Lopes, J.). According

to the American authorities, however, a rule of a railroad company requiring its conductors of trains to eject therefrom all passengers who refuse upon demand to produce a ticket for the passage, or to pay the fare therefor, is unquestionably valid and reasonable. *Shelton v. Lake Shore & Mich. Southern R. Co.*, 29 Ohio St. 214; *Crawford v. Cincinnati, etc., R. Co.*, 26 Ohio St. 580; *Townsend v. New York C. & H. R. R. Co.*, 56 N. Y. 296; *Hibbard v. New York & Erie R. Co.*, 15 N. Y. 455; *Ripley v. New Jersey, etc., Trans. Co.*, 31 N. J. L. 388; *Bennett v. Railroad Co.*, 7 Phila. 11; *Woodard v. Eastern Counties R. Co.*, 30 L. J. (M. C.) 136; *Lane v. East Tenn. etc., R. Co.*, 2 Am. & Eng. R. R. Cas. 278; *Pullman P. Car Co. v. Reed*, 75 Ill. 125; *Louisville & N. R. Co. v. Harris*, 9 Lea (Tenn.), 180; s. c., 16 Am. & Eng. R. R. Cas. 374; *Louisville, etc., R. Co. v. Fleming*, 18 Am. & Eng. R. R. Cas. 347; *Downs v. New York & H. R. Co.*, 36 Conn. 287; *Jerome v. Smith*, 48 Vt. 230; *Duke v. Great Western R. Co.*, 14 U. C. Q. B. 377. See also cases cited in note to *Swan v. Manchester & L. R. Co.*, 6 Am. & Eng. R. R. Cas. 332. But see *Maples v. New York, etc., R. Co.*, 38 Conn. 557. The reasons for upholding the validity of such a rule as this are clearly stated by Denio, C. J., in *Hibbard v. New York & Erie R. Co.*, 15 N. Y. 455. He said, —

“It was proved that the defendant’s company had established a regulation by which passengers were required to exhibit their tickets when requested to do so by the conductor, and that in case of refusal they might be removed from the cars. If this was a reasonable regulation, the plaintiff was bound to submit to it, or he forfeited his right to be carried any farther on the road. In my opinion the rule was reasonable and proper, and in no way oppressive or vexatious. In the first place, it was easy to be complied with. The railroad ticket is a small slip of paper or pasteboard, which may be conveniently carried about the person; and it involves no conceivable trouble for the passenger, when called upon at his seat by the conductor, to exhibit it to him. Then, no one can question but that this or some similar arrangement is absolutely necessary for the company, unless they are willing to transport passengers free. A train of railroad cars frequently contains several hundred passengers, a portion of them constantly changing as the train passes stations where persons are received and discharged. The tickets which are given as evidence of the payment of fare are of as many different kinds as there are stopping-places on the road, each being for the distance or to the place for which the passenger has paid his fare. The conductor must necessarily be a stranger to all or a large portion of the passengers. Unless he is allowed a sight of these evidences of the payment of fare whenever he may require it, he is exposed to the chance of carrying the holder of them beyond the place to which he is paid, or of carrying persons who have not paid at all. If the conductor is not allowed to ascertain whether a passenger who has obtained a ticket still keeps it, there is nothing to prevent its being given to another passenger who has not procured one, and thus serving as a passport for several passengers. But it is argued that, if the ticket has been once shown to a conductor, the passenger cannot reasonably be required to exhibit it a second time. If the duty of showing it were at all difficult or arduous, it might be a question whether the company would not be bound to devise some easier arrangement; or if it was possible that the memory and other faculties of persons employed as conductors could be so cultivated that they could know and remember the persons of several hundred people upon seeing them for the first time, and could, moreover, retain the recollection of the terms of the several tickets held by them upon their being once shown, it might be considered unreasonable to require a second exhibition of a ticket in any case. As this degree of perfection is unattainable in the present condition of mankind, I am of opinion that it was lawful for this railroad company to require that persons engaging passage in its cars should show their tickets whenever required by the company’s servants intrusted with that duty, upon pain of being left to travel the remaining distance in some other way in case of refusal.”

Brown, J., in the same case, argued in a similar vein: "The instructions which the judge, upon the trial of this action, gave to the jury, and also those which he refused to give when requested by the counsel for the defendant, involve an inquiry into the rights and duties of the company under the contract which is the basis of the plaintiff's claim.

"The defendant is a carrier of passengers for hire by railroad. 'It is bound to give all reasonable facilities for the reception and comfort of passengers, and to use all precautions, as far as human care and foresight will go, for their safety upon the road, and is answerable for the smallest negligence in itself or its servants.' 2 Kent's Com. 601. Transportation by railway is one of the highest efforts of science and art, and imposes upon those employed in it a degree of care, circumspection, and diligence unknown to other modes of conveyance. It implies also a degree of authority in the direction and management of the trains, in their progress over the road, and in regard to the time and manner in which passengers shall enter and depart from, and the conditions by which they are to remain within, the cars, little less than absolute. Such regulations as will enable a railroad corporation to execute its difficult and responsible duties, insure the comfort and safety of its passengers, and protect itself from wrong and imposition, it has an undoubted right to prescribe, provided such regulations are reasonable and just. It has a right to require that passengers shall preserve order; that they shall be seated, and not stand up in the passage-way or upon the platforms; and that they shall abstain from any act which tends to impede or interrupt the conductors and managers in the transaction of their necessary business. A railroad company has also a right to prescribe how, and at what places, the passengers shall pay their fare or passage-money, and what shall be evidence to the conductor that such money has been paid, and of the passenger's right to ride upon the train. It may also require passengers to accept tickets temporarily; to exhibit them from time to time, upon the request and for the information of the conductors; and finally, to re-deliver such tickets, upon request, before leaving the cars. Some of these regulations are necessary to insure the safety of the passengers themselves, and others to insure the payment of the regular fare, and to protect the carrier from imposition. They may be enforced by such reasonable means as the company may have at its command; for, without some measure of power to give them effect, such regulations would be of little avail. Commonwealth v. Power, 7 Metc. 596; Hall v. Power, 12 Id. 482."

Expulsion of Passenger for Failure to produce Ticket. — Analogous American Cases. — The principal case is in conflict with a long line of American decisions. These decisions go upon the ground, that, as was argued by counsel for the defendant in the principal case, under a reasonable interpretation of the contract between the railway company and the passenger, regard must be had to the conditions under which the company carry on their business, and the common knowledge of railway passengers as to tickets. It is obviously impossible for the company to ascertain whether the passenger is entitled to be carried in the absence of a ticket; and therefore, as is shown above, it would seem to be a very reasonable condition, as between the company and the passenger, that the production of the ticket is to be the conclusive test as to his right to be carried. It was denied by the court in the principal case that a reasonable implication would be, that the contract is, that the passenger produce his ticket or pay his fare; and if he fails to do so, he shall have no further right to be carried. This position is clearly sustained by the American cases. The contract of carriage, as evidenced by the ticket, only entitles the passenger to be on the company's premises on certain conditions. The purpose for which he is on the company's premises, and in their cars, having come to an end, he has ceased to be there lawfully, and the company may remove him. There is no doubt that if a passenger cannot produce a ticket, the company's servants might forcibly prevent him from boarding the train, even if he had paid his

fare ; if so, it should certainly follow that they might remove him from the train on failure to produce a ticket. •

Among the many American cases bearing upon the point raised in the principal case, there will be set out in this note only those whose facts bear the closest analogy to those before the English court. In *Hibbard v. New York & E. R. Co.*, 15 N. Y. 455, the plaintiff proved the purchase of a ticket, and its exhibition at the request of the conductor once after the train had started ; afterwards the conductor called upon the plaintiff again to exhibit his ticket, and, upon his refusing, he was informed by the conductor that unless he showed his ticket or paid his fare to the conductor the latter would stop the train and put him off the cars. The plaintiff said that he had just shown his ticket, and should not do it again. The conductor then stopped the train, and caused the plaintiff, who resisted, to be forcibly put off the cars by two brakemen. Another passenger informed the brakeman immediately before he stopped the train that the plaintiff had a ticket, and that he had once exhibited it. After the conductor had given the signal by pulling the bell-cord to stop the train, the plaintiff actually showed his ticket, and defied the conductor to put him off. Judgment on a verdict for plaintiff of \$1,000 was reversed, the court saying, "The rule is a reasonable one, that the conductor may ask to see the ticket of passengers after leaving each station where new passengers are taken up. If a passenger refuses to comply with such a rule, and is expelled, the law should not allow him to allege and try the fact of the conductor's knowledge of the payment of the fare."

In *Downs v. New York & N. H. R. Co.*, 36 Conn. 287, it appeared that the plaintiff purchased of the defendant a commutation ticket entitling him to ride within its cars, within certain limits, for a certain length of time, upon certain conditions. One of the conditions was, that the ticket should be shown to the conductor on every passage, and, if not shown when called for, that the regular fare should be paid. Upon one of his passages the plaintiff had by mistake left his ticket at home, and was unable to show it when called for. *Held*, (1) that the defendant had a right to demand of him the ordinary fare ; (2) That the conductor, on his refusal to pay the fare demanded, had a right, under the rules of the company in such cases, to eject him from the cars at the next station.

In *Jerome v. Smith*, 48 Vt. 230; s. c., 21 Am. Rep. 125, plaintiff bought a ticket over defendant's road, with coupons attached. A conductor detached one of the coupons, and gave him instead a conductor's check. Before reaching the point for which such check was given, another conductor took the train, and demanded the check. Plaintiff could not find it, but tendered him the ticket with the remaining coupons, which was refused, and plaintiff was ejected without unnecessary force. *Held*, that defendants were justified.

In *Townsend v. N. Y. Cent. & H. R. R. Co.*, 56 N. Y. 295, it was shown that plaintiff purchased a ticket at the station at Sing Sing for Rhinebeck ; that with this ticket he went on board a train from New York, going no farther north than Poughkeepsie ; that after this train passed Peekskill the conductor called for tickets, and the plaintiff handed his to him, which he took and retained, giving to the plaintiff no check or other evidence showing any right to a passage upon any train of the defendant, nor did the plaintiff ask for a return of his ticket or for any such evidence. Upon the arrival of the train at Poughkeepsie, where it stopped, the plaintiff got out and waited at the station until another train arrived from New York, which was going to Albany, stopping at Rhinebeck. The plaintiff got into and seated himself in a car in this train, and, after it started, the conductor called upon him for his ticket, in reply to which the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck which the conductor of the other train had taken and had not given back to him. Some of the passengers told the conductor that the plaintiff had such a ticket. The conductor told the plaintiff that it was his

duty, in case he had no ticket, to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff, still refusing to pay fare or leave the train upon request, was taken hold of, and such force used as was necessary to overcome his resistance, and ejected from the car. A judgment upon a verdict finding for the plaintiff was reversed.

See also *Louisville & N. R. Co. v. Fleming*, and note, 18 Am. & Eng. R. R. Cas. 347-362; *Hays v. New York Cent., etc., R. Co.*, 18 Ib. 363; *City, etc., R. Co. v. Brauss*, 18 Ib. 324. Note 6 Am. & Eng. R. R. Cas. 322.

RICE

v.

LOUISVILLE & NASHVILLE R. CO. *et al.*

(*Interstate Commerce Commission, Feb. 23, 1888.*)

Transportation of Petroleum. — Provision of Rolling-Stock by Carrier. — When for a special traffic — e.g., the transportation of petroleum oils — a carrier provides rolling-stock for one method, but does not provide it for another for which it publishes rates, but the shippers are expected to provide the same, the terms on which such rolling-stock is to be provided should be uniform and be published with the rate-sheets, and cannot lawfully be left to be the subject of bargain and of different terms in the case of different shippers.

Allowing Shipper to provide their own Rolling-Stock. — It is properly the business of a carrier by railroad to supply the rolling-stock for the freights he offers or proposes to carry; and if the diversities and peculiarities of traffic are such that this is not always practicable, and consigners are allowed to supply it for themselves, the carrier must not allow its own deficiencies in this particular to be made the means of putting at unreasonable disadvantage those who make use in the same traffic of the facilities it supplies.

Different Modes of Transportation provided should be relatively Equal. — Small Shippers. — When two methods for the transportation of an article of merchandise are nominally offered by the carrier, for only one of which it offers rolling-stock, and for the other of which the shipper must supply his own rolling-stock at considerable expense, it cannot be said that the resort to the latter by the shipper is so far a matter of choice that he has no concern with the charges for transportation in the other mode. The man of small means, being compelled to make this choice by reason of the carrier's failure to supply rolling-stock for the other mode, has a right to insist that the charges by transportation in the two modes shall be relatively just and equal.

Rates to Shippers of Oil in Barrels and Tank-Cars should be Same. — When oil is transported in tanks permanently affixed to car bodies, the tank is to be considered as part of the car; and for oil transported therein, the charge for transportation should be the same by the hundred pounds that the carrier charges for transportation between the same points of barrels filled with like oil, and taken in car-load lots. The carrier is guilty of unjust discrimination if the shipper in barrels is charged a higher rate.

Circumstances to justify imposing on Barrel-Shipper Greater Burden. — Neither the fact that the shipper in the one case supplies the rolling-stock, nor the alleged fact, which is not found sustained, that for the tanks there is a

greater probability of return loads, nor the further alleged fact that with barrel shipments there are greater risks to the carrier's property and that which it carries, can justify imposing upon the barrel shipments the greater burden.

Allowance to Tank-Car Owner for Use. — Under this rule the carrier will be at liberty, and will be expected, to make to the owner of tank-cars a reasonable allowance for their use.

Question Raised, but not Decided. — When an important question is raised by the pleadings in a case, the determination of which will affect others quite as much as the parties before the Commission, but the parties give their attention almost exclusively to other questions, and neither by the evidence nor in argument supply the Commission with the information to enable it to be understandingly determined, the Commission will decline to decide it, and leave the parties to bring it forward again as they may be advised.

A. D. Follett, W. B. Loomis, J. Randolph Tucker, and Franklin B. Gowen for complainant.

Edward Baxter and *L. H. Noble* for defendant L. & N. R. R. Co.

John S. Blair for defendant St. L., I. M. & S. Ry. Co.

E. L. Russell for defendant M. & O. R. R. Co.

Edward Colston and *Charles M. Cist* for defendants C., N. O. & T. P. Ry. Co., & Ala. G. S. R. R. Co.

Holmes Cummins for defendants N. N. & M. Co. & L., N. O. & T. Ry. Co.

H. D. Money for defendants Miss. & Tenn. R. R. Co. & Ill. Cent. R. R. Co.

COOLEY, Chairman. — The questions at issue in these cases are to some extent identical, and where not the same, are so far similar that it was deemed practicable by the parties that they should all be tried together. They have accordingly been so tried; the evidence being, by consent, taken in the case first entitled, but received and applied in each of the others, so far as it was found to be applicable. The principal grievance complained of is, that the defendant companies discriminate against the complainant in their charges for the transportation of petroleum oil; but the rates for the transportation of the oil in barrels, which is the method made use of by complainant, are also alleged to be excessive, and in some cases a violation of the fourth section of the Act to regulate commerce is complained of. The petition in the case first entitled, after setting out the line of the defendant's road, and the cities and other points reached thereby, proceeds to say, —

Facts and
pleadings.

“ That one of the important duties of said Louisville & Nashville Railroad Company is the transportation of refined illuminating petroleum oil (mostly produced and manufactured in the States of Pennsylvania and Ohio) from Cincinnati, O., and Louisville, Ky., to the aforementioned cities and other points on the said carrier's said lines of railroad in the said several States, and other States into and through which said carrier's railroad lines pass.

"That such oil is an article of extensive commerce and of prime necessity to the people reached by said carrier's railroad lines, and that in the transportation of such oil by said carrier two prevailing methods are employed, — one by means of box cars carrying the oil in barrel packages, and the other by iron tank-cars, generally holding one hundred barrels and upwards, built and used for that express purpose.

"And said complainant further says that he is engaged at Marietta, O., and in that vicinity, in the business of producing, manufacturing, and dealing in such petroleum oils, and shipping the same to various markets in the Southern and Western States of this country; that he has large capital invested in this business, and extensive facilities therefor, and, but for the acts of said carrier hereinafter complained of, would produce and sell many thousand more barrels of such oil than now; that many of his principal markets for his said manufacture are in the territory reached and traversed by said carrier's system of railways; that it is absolutely essential to the continued existence and success of his said business that he should have rates and facilities both reasonable in themselves, and equally as favorable as those accorded to his competitors for the transportation of said products to such markets, many of which can only be reached by said carrier's roads, and none of which can be reached as conveniently or cheaply by any other means, if said complainant is accorded reasonable and just rates by said carrier.

"Complainant further states that the Standard Oil Company, a corporation organized and existing in and under the laws of the State of Kentucky, is a very extensive dealer in, and shipper of, such petroleum oils, and is his chief and almost sole competitor for the sale thereof in the aforesaid markets.

"And said complainant further states that said carrier has been guilty of violation of the provisions of the Act of Congress of the United States of America entitled 'An Act to regulate commerce,' approved Feb. 4, 1887, and which took effect April 5, 1887, in the following particulars; to wit, —

"First charge. By making charges for services to be rendered by said carrier in the transportation of such as aforesaid from Cincinnati, O., and said Louisville, Ky., to points on the said carrier's said railroad lines in the said States other than Ohio and Kentucky, which were in themselves unjust and unreasonably high.

"Under this charge the complainant makes the following specifications, each and all of which are rates per hundred pounds charged by said railroad company on May 9, 1887, and as complainant is informed and believes, and so alleges, ever since that day, for services to be rendered by said company in the transportation in barrel packages in car-load shipments of such oils from

said Louisville, Ky., to the respective destinations named, each and all of which destinations are points reached by the lines of railroad owned, leased, and operated by said railroad company, and each and all of which rates complainant alleges to be unreasonable and unjust.

"1. Mobile, Ala., 30 cents.

"2. New Orleans, La., 30 cents.

"3. Montgomery, Ala., $45\frac{7}{10}$ cents.

"4. Selma, Ala., $45\frac{7}{10}$ cents.

"5. Birmingham, Ala., $45\frac{7}{10}$ cents.

"6. Nashville, Tenn., $18\frac{3}{4}$ cents.

"7. Memphis, Tenn., 15 cents.

"8. Clarksville, Tenn., $16\frac{3}{10}$ cents.

"9. All other points reached by said lines of railroad located in States other than Kentucky, the rates of which appear in the statement of rates required by said Act of Congress, and on file with said commission, and each and all of which rates complainant alleges to be unreasonable and unjust. Complainant, under said charge, also makes the following specifications, each and all of which are the rates per hundred pounds charged by said railroad company for the transportation of such oils in barrel packages, in car-load shipments from Cincinnati, O., to the respective destinations named, each and all of which are points reached by the lines of the railroad owned, leased, and operated by defendants, and are in States other than the State of Ohio, which rates appear on the tariff sheets of defendant, furnished by it to complainant May 9, 1887, as showing its rates then in force, and which rates complainant is informed and believes and alleges have ever since been in force, each and all of which rates complainant alleges to be unreasonably high and unjust.

"10. Nashville, Tenn., 25 cents.

"11. Decatur, Ala., 50 cents.

"12. Birmingham, Ala., 59 cents.

"13. Calera, Ala., 59 cents.

"14. Montgomery, Ala., 59 cents.

"15. Selma, Ala., 59 cents.

"16. Pensacola, Fla., 45 cents.

"17. Mobile, Ala., 39 cents.

"18. New Orleans, La., 39 cents.

"Second charge. Complainant, for a second charge against defendant, alleges that defendant has, ever since April 5, 1887, charged complainant for services to be rendered by the defendant in the transportation of such oils for complainant from said Cincinnati, O., to points in States other than Ohio reached by the lines of railroad owned, operated, and leased by defendant, and from Louisville, Ky., to points in States other than Ken-

tucky reached by said lines of railroad, a greater compensation than it charged said Standard Oil Company of Kentucky for like and contemporaneous services rendered and to be rendered by defendant for said company in the transportation of such oils for said company, said company being sometimes consignee thereof and sometimes consignor thereof, and sometimes both consignee and consignor thereof, from said Cincinnati, O., to said points in States other than Ohio, and from said Louisville, Ky., to said points in States other than Kentucky, all of said transportation, both for complainant and said Standard Oil Company, being under substantially similar circumstances and conditions.

“Under the above charge complainant makes the following specifications:—

“1. The following is a statement of the rate per hundred pounds charged by defendant on May 9, 1887, and ever since, to complainant and to said Standard Oil Company of Kentucky for the transportation of such oils from Louisville, Ky., to the respective destinations named:—

DESTINATION.	TO GEORGE RICE.	TO STANDARD OIL CO.
Montgomery, Ala.	45 ⁷ / ₁₀ cents.	30 cents.
Selma, Ala.	45 ⁷ / ₁₀ “	30 “
Birmingham, Ala.	45 ⁷ / ₁₀ “	30 “
Nashville, Tenn.	18 ³ / ₄ “	15 “
Memphis, Tenn.	15 “	12 ¹ / ₂ “

“2. The following is a statement of the rate per hundred pounds charged by defendant on May 9, 1887, and ever since, to complainant and said Standard Oil Company of Kentucky respectively, for the transportation of such oils from Cincinnati, O., to the respective destinations named:—

DESTINATION.	TO GEORGE RICE.	TO STANDARD OIL CO.
Decatur, Ala.	50 cents.	46 cents.
Birmingham, Ala.	59 “	47 “
Calera, Ala.	59 “	47 “
Montgomery, Ala.	59 “	47 “
Selma, Ala.	59 “	47 “
Pensacola, Fla.	45 “	40 “
Mobile, Ala.	39 “	34 “
New Orleans, La.	39 “	34 “

“3. Defendant has, in all its charges to complainant for services rendered and to be rendered by it in the transportation of oils for him over its said lines of railroad, charged him for the entire actual weight of such oils; while defendant has in many instances, too numerous to mention without unduly encumbering the record, since April 5, 1887, charged said Standard Oil Company for services rendered it or to be rendered by it for said Standard Oil Company in transportation of oils over its said lines of railroad for much less than the actual weight of such oils.

"4. The freight rate charged by defendant to complainant ever since April 5, 1887, for the transportation of such oils in barrel packages, car-load shipments, owner's risk, from Louisville, Ky., to Huntsville, Ala., is 37 cents per hundred pounds, including the weight of barrels, which is the rate for such transportation appearing in the tariff sheet of defendant in force ever since April 5, 1887; yet about May 1, 1887, a car-load of oil, containing 66 barrels of oil, weighing, including barrels, 24,750 pounds, was delivered by said Standard Oil Company to defendant at Louisville, Ky., to be transported to Huntsville, Ala. Said oils were consigned to Halsey Brothers at Huntsville, Ala., who were the agents at said place of said Standard Oil Company, and competitors in business at said point with complainant. Said oils were transported from Louisville, Ky., to Huntsville, Ala.; and the charge made by defendant for such transportation was \$68.07, or 27½ cents per hundred pounds.

"Third charge. Complainant, for a third charge against defendant, says that the defendant in its rates charged by it for services rendered and to be rendered by it for the transportation of said oils for complainant and said Standard Oil Company from Cincinnati, O., to points reached by defendant's said lines of railroads in States other than Kentucky, has, since April 5, 1887, uniformly made and given undue and unreasonable preferences and advantages to said Standard Oil Company of Kentucky and to certain localities on its lines of railroad, and has subjected complainant and certain localities on its lines of railroad to undue and unreasonable prejudices and disadvantages.

"Under the above charge complainant makes the following specifications:—

"1. Complainant here repeats under this charge specification No. 1 under the second charge of his complaint, and alleges that the differences in the circumstances surrounding the shipments of said George Rice and said Standard Oil Company, and that any differences to defendant in the cost and expense and convenience of transportation of such oils of said George Rice and said company respectively, and any differences between the circumstances under which said George Rice and said company respectively ship their oils, justifying any difference in rate, if there be any, are small and insignificant in comparison with the differences in the rates so charged them respectively.

"Complainant here repeats under this charge specification No. 2 under the second charge of his complaint, and alleges that the differences in rates therein appearing are not measured by any differences in the circumstances surrounding the shipments of said George Rice and said Standard Oil Company, and that any differences to defendant in the cost and expense and con-

venience of transporting such oils for said Rice and said company respectively, and any differences between the circumstances under which said Rice and said company respectively ship their oils, justifying any difference in rate, if there be any, are small and insignificant in comparison with the differences in the rates charged them respectively.

“Complainant is informed and believes, and therefore states, that —

“3. Defendant owns a number of tank-cars, as hereinbefore described, and furnishes the same to the said Standard Oil Company for its use in transporting oil shipped by said company from Cincinnati, O., to points reached by defendant's said lines of railroad in States other than in Ohio, and from Louisville, Ky., to points reached by defendant's said lines of railroad in States other than Kentucky, but refuses to furnish the same to said George Rice for his use in transporting oil from said Cincinnati, O., and Louisville, Ky., to such points in States other than Ohio and Kentucky.

“4. Defendant in its freight rates for the transportation of such oils from Cincinnati, O., to points reached by defendant's said lines of railroad in States other than Ohio, and from Louisville, Ky., to points reached by defendant's said lines of railroad in States other than Kentucky, almost uniformly, since April 5, 1887, has charged a higher rate per hundred pounds for oil transported by it in barrel packages, in car-load shipments, owner's risk, than it charged per hundred pounds for such oils transported by it at the same time between the same points contained in tank-cars, owner's risk; while at no time has there been any difference between the cost, expense, and convenience of transporting said oil by said two methods, or any circumstances justifying a difference of rate between said two methods of transportation, which even approximated the differences in defendant's freight rates for transportation by said two methods; any differences between the cost, expense, and convenience to defendant of transportation by said two methods, or any circumstance justifying a difference in rate between said two methods, being slight and insignificant compared with the differences in rate between said two methods actually made by defendant. Complainant ships his oils over defendant's lines of railroad exclusively in barrel packages, while said Standard Oil Company ships its oil over defendant's lines of railroad almost exclusively in tank-cars.

“5. Defendant's freight rates per hundred pounds for the transportation of such oils from Louisville, Ky., to the following destinations are the same whether the oil is carried in barrel packages or in tank-cars:—

Mobile, Ala.	Meridian, Miss.	Jackson, Tenn.
New Orleans, La.	Jackson, Miss.	Vicksburg, Miss.

"While defendant's freight rates per hundred pounds for the transportation of such oils from Louisville, Ky., to nearly all, if not all, the other points reached by defendant's lines of railroad in States other than Kentucky, are much higher for oils carried in barrel packages than for oils carried in tank-cars.

"6. Defendant's freight rates per hundred pounds for the transportation of such oils from Cincinnati, O., to Nashville, Tenn., and Mobile, Ala., are the same whether the oil is carried in barrel packages or in tank-cars, whilst the defendant's freight rates per hundred pounds for the transportation of such oils from Cincinnati, O., to nearly all, if not all, the other points reached by defendant's lines of railroad in States other than Ohio, are much higher when the oils are carried in barrel packages than when the oils are carried in tank-cars.

"7. Defendant has, since April 5, 1887, charged for the transportation of oils from Cincinnati, O., and from Louisville, Ky., to Birmingham, Ala., Calera, Ala., Montgomery, Ala., and Selma, Ala., the same freight rates in all cases to each of said localities, although by defendant's line of road said Calera is thirty-three miles farther from said Cincinnati and said Louisville than said Birmingham, and said Montgomery is sixty-three miles farther from said Cincinnati and said Louisville than said Calera, and said Selma is fifty miles farther from said Cincinnati and said Louisville than said Montgomery; and oils transported by defendant from Cincinnati, O., or Louisville, Ky., to said Selma, are necessarily carried by it through said Birmingham, said Calera, and said Montgomery, and the distance from said Cincinnati to said Selma over defendant's line of road is 650 miles, and the distance from said Louisville to said Selma over defendant's line of road is 540 miles."

"Fourth charge. Complainant, for a fourth charge against defendant, says that defendant has, since April 5, 1887, charged and received for the transportation by it of such oils from Cincinnati, O., and Louisville, Ky., to points reached by defendant's said line of railroad in States other than Ohio and Kentucky, a greater compensation in the aggregate for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, such oils being a like kind of property in all cases, and such transportation being under substantially the same circumstances and conditions.

"Under the above charge complainant makes the following specification: The rate charged by defendant for the transportation of such oils in barrel packages in car-load shipments, from Cincinnati, O., to and from Louisville, Ky., to destinations named below, with the distances of each destination from the

place of shipment over defendant's said line of railroad, are as follows : —

“From Cincinnati, O. : —

DESTINATION.	DISTANCE.	RATE PER 100 POUNDS.
New Orleans, La.	921 miles.	39 cents.
Birmingham, Ala.	504 “	59 “
Mobile, Ala.	780 “	32 “

“From Louisville, Ky. : —

DESTINATION.	DISTANCE.	RATE PER 100 POUNDS.
New Orleans, La.	811 miles.	35 cents.
Birmingham, Ala.	594 “	52 “
Mobile, Ala.	780 “	35 “

“Said complainant further alleges that the aforesaid discriminations against him in rates, and the aforesaid unreasonably high and unjust rates charged him, have had, and as he believes were designed to have, the effect to give to the Standard Oil Company an almost complete monopoly of the traffic in such oils at the points reached by said defendant's lines of railroad, and to exclude said complainant's products from nearly all of said points ; and that such discriminations and charges, as complainant is informed and believes, and therefore states, have been made by said defendant at the dictation of said Standard Oil Company ; and he states that, by reason of the premises, he has been largely injured in his business, and has lost large profits that he otherwise would have realized ; that his facilities in all other respects than for said transportation during all the time since April 5, 1887, have been ample for the transaction of a large and profitable business in the sale of said oils in said markets, and that but for the premises he would have prosecuted such business to the limits of his facilities with great profit to himself.

“Your said complainant therefore prays that your honorable Commission will proceed to inquire into the matters hereinbefore complained of, and ascertain and find the facts with respect to the alleged violation of the said Act of Congress, and the extent to which said complainant has been injured and is entitled to reparation, and report the same with your conclusions and recommendations according to law ; and further, that your honorable Commission will notify said defendant to cease and desist from such violations, and make such reparation, and will take such further action as is lawful and proper in the premises.”

The petition was duly verified, and was filed July 22, 1887.

The answer of defendant is also given in full, with the omission only of formal averments and such recitals as are not necessary to an understanding of the issues made. Defendant “admits that,

in the transportation of said oil to some, if not all, of aforesaid towns and cities, two methods are employed, — one by means of box cars, carrying oil in barrel packages; the other by iron tank-cars, generally holding, not one hundred, but sixty barrels or over that amount.”

Further answering, defendant says it does not know, but believes, that complainant Rice is engaged at Marietta, O., or in that vicinity, in the business of producing, manufacturing, and dealing in petroleum oils, and in shipping the same to various markets in the Southern and Western States of this country; but whether he has large capital, or what amount of capital he has, invested in said business, or whether he has extensive facilities, or what facilities he has therefor, defendant does not know, nor can he speak, for his belief or otherwise; but it denies that but for the alleged acts of this defendant, in complainant's said bill complained of, he would produce or sell many thousand more or any more barrels of such oil than he now produces and sells. Defendant admits that many of complainant's principal markets for his said manufactures are in the territory reached and traversed by this defendant's system of railways; that it is absolutely essential to the continued existence and success of his said business that he should have rates and facilities both reasonable in themselves and equally as favorable under similar circumstances and conditions as those accorded to his competitors for the transportation of said products to such markets, and defendant admits that many of them can only be reached by defendant's roads; but it denies that none of said markets can be as conveniently or cheaply reached by any other means, if complainant is accorded reasonable and just rates by this defendant. Defendant admits that the Standard Oil Company is a corporation incorporated and organized under the laws of Kentucky, and that it is a very extensive dealer in and shipper of such petroleum oil, and defendant believes that said Standard Oil Company is the chief competitor of complainant for the sale thereof in the aforesaid markets.

“For answer to the first charge made in complainant's bill and specifications thereunder, defendant says, —

“(1) It is not true, and it denies, that it has been guilty of any violations of the provisions of the Act of Congress of the United States entitled ‘An Act to regulate commerce,’ approved Feb. 4, 1887, either by making charges for services to be rendered by it as common carrier in the transportation of oil from Cincinnati, O., or Louisville, Ky., to points on its railroad lines in States other than the States of Ohio or Kentucky, or in any other manner.

“(2) It admits that on May 9, 1887, and ever since that time,

for services to be rendered by it in the transportation in barrel packages, in car-load shipments of petroleum oil from Louisville, aforesaid, to Mobile, Ala. ; New Orleans, La. ; Montgomery, Ala. ; Selma, Ala. ; Birmingham, Ala. ; Nashville, Tenn. ; Memphis, Tenn. ; and Clarksville, Tenn., — its charges were the respective prices set out in complainant's bill of complaint, and it also admits that each one of said towns is reached by its lines of road, and the South and North Alabama railroad, except Selma, Ala. which cannot be reached thereby ; but defendant says it is not true, and it denies, that said rates or any of them are unreasonably high or unjust.

" (3) Defendant denies that the rate or rates to all other points or to any point reached by its lines of railroad located in any State other than Kentucky, fixed by it in its schedule required by law to be, and which has been, filed with the honorable Commission, are or is unreasonable or unjust.

" (4) It admits that the following rates per hundred pounds for shipment of petroleum oil in barrel packages, car-load shipments, from Cincinnati, O., to the following points in States other than Ohio are the rates which appear on its tariff sheets furnished by it to complainant on May 9, 1887, as the rates then in force, and they are rates which are now in force ; to wit, —

" Nashville, Tenn., 25 cents.

" Decatur, Ala., 50 cents.

" Birmingham, Ala., 59 cents.

" Calera, Ala., 59 cents.

" Montgomery, Ala., 59 cents.

" Selma, Ala., 59 cents.

" Pensacola, Fla., 45 cents.

" Mobile, Ala., 39 cents.

" New Orleans, La., 39 cents.

" Except that the rate furnished for shipment to Nashville, Tenn., was 28 $\frac{3}{4}$, instead of 25 cents ; that to Pensacola was 40 cents, instead of 45 cents ; that to New Orleans and that to Mobile was 34 cents each, instead of 39 cents ; and defendant admits that all of said points are reached by its lines of road, except Selma, and except all points between Decatur and Montgomery, Ala., which cannot be thus reached ; but defendant says it is not true, and it denies, that said rates or any of them are unjust or unreasonably high.

" For answer to the second charge made in complainant's bill and the specifications thereunder, defendant —

" (1) Denies that it has at any time since April 5, 1887, charged complainant for services to be rendered by this defendant in the transportation of such oils to points in States other than Ohio reached by its lines of railroad, or from Louis-

ville, Ky., to points in States other than Kentucky reached by said lines of railroad, a greater compensation than it charged said Standard Oil Company of Kentucky for like and contemporaneous services rendered or to be rendered by this defendant for said company in the transportation of such oils for said company from said Cincinnati, O., or from Louisville, Ky., to said points or any of them in States other than Kentucky, and denies that the shipments referred to by complainant in his said bill were made for him, and for said Standard Oil Company under substantially similar circumstances or conditions.

“(2) It admits that the rate per hundred pounds charged by it to complainant on May 9, 1887, and ever since, for the transportation of such oils from Louisville, Ky., to the respective destinations named in complainant's bill, is the rate given therein; to wit, —

“To Montgomery, Ala., $45\frac{7}{10}$ cents; Selma, Ala., $45\frac{7}{10}$ cents; Birmingham, Ala., $45\frac{7}{10}$ cents; Nashville, Tenn., $18\frac{1}{2}$ cents; Memphis, Tenn., 15 cents; and that on some oil shipped by it during that time for the Standard Oil Company defendant charged from Louisville to said respective points per hundred pounds the following rates, as stated in complainant's bill; to wit, —

“To Montgomery, 30 cents; to Selma, 30 cents; to Birmingham, 30 cents; to Nashville, 15 cents; and to Memphis, $12\frac{1}{2}$ cents.

“(3) It further admits that its rate to complainant on May 9, 1887, and ever since, for shipments of oil from Cincinnati, O., to the following points, per hundred pounds, were the rates stated in complainant's bill; to wit, —

“To Decatur, Ala., 50 cents; to Birmingham, Ala., 59 cents; Calera, Ala., 59 cents; Montgomery, Ala., 59 cents; Selma, Ala., 59 cents; to Pensacola, Fla., 45 cents; to Mobile, Ala., 39 cents; and to New Orleans, La., 39 cents; with the exception that the charge was and is from Cincinnati to Pensacola, 40 cents instead of 45 cents, and to Mobile and to New Orleans, each 34 cents instead of 39 cents; and the defendant further admits that during said time it was shipping some oil for the Standard Oil Company from Cincinnati to aforesaid towns at the following rates per hundred pounds; to wit, to Decatur, 46 cents; to Birmingham, 47 cents; to Calera, 47 cents; to Montgomery, 47 cents; to Selma, 47 cents; to Pensacola, 40 cents; to Mobile, 34 cents; to New Orleans, 34 cents; except that to Birmingham, since May 11, 1887, the rates have been a little less than 47 cents per hundred pounds. But defendant denies that in its said rates for shipment for the Standard Oil Company and for complainant from Cincinnati and from Louisville respectively, to aforesaid respective

towns or any of them, it discriminated in favor of the Standard Oil Company or against complainant, or that by said rates, shipped under the circumstances that said oils were respectively shipped, defendant charged complainant per hundred pounds a greater compensation than it charged said Standard Oil Company.

"Defendant says that all the rates for shipments for complainant made so as aforesaid from Cincinnati and from Louisville respectively, to aforesaid respective towns, were made for shipments in barrel packages and car-load shipments, and all of the rates for shipments for the Standard Oil Company so as aforesaid from Cincinnati and from Louisville respectively, to said respective towns, were made for shipments in tank-cars, cost of transportation or the shipment and risk of which is much less than the cost of transportation or shipment and the risk of a like quantity of oil in barrels; that the rate paid or to be paid as aforesaid by complainant for such shipments is the same rate per hundred pounds, neither greater nor less, than was and is by defendant charged to and paid by the Standard Oil Company for shipments of oil in barrel packages, car-load shipments, at the same time and from and to the same points that said shipments for complainant were made; and defendant also states that at the same rates charged the Standard Oil Company for the shipments of its oil so as aforesaid in tank-cars from Cincinnati and from Louisville respectively, to said several respective towns, complainant could have shipped, as he well knew, his oil in like kind of tank-cars at any time on or after the ninth day of May, 1887, and the same rates as aforesaid were offered him, and published in defendant's schedules of rates furnished the honorable Interstate Commission.

"(4) Defendant admits that, in its shipment of oil in barrels for complainant, it has charged or intended to charge him for the actual weight of such oils, and it has also charged or intended to charge in its shipments of oil in barrels for the Standard Oil Company for the actual weight of such oils, and it denies that it has in any shipment of oil in barrels made any difference in this respect between oil shipped for complainant and oil shipped for the Standard Oil Company.

"Defendant says, that, as to the shipment of oil in tanks for the Standard Oil Company and everybody else, the same is not and never has been weighed, but the quantity contained in the tanks is estimated at a certain number of pounds; and it may be true that in some shipments for the Standard Oil Company that estimates were below the actual weight, but the same quantity of oil could have been shipped in the same manner at the same price by complainant.

"(5) Defendant denies that about May 1, 1887, it transported

or contracted to transport a car-load containing 66 barrels of oil, and weighing 24,750 pounds, or any other weight, from Louisville, Ky., to Huntsville, Ala., for the Standard Oil Company, for \$68.07, or 27½ cents per hundred pounds ; at least, no record of such shipment can be found on defendant's books.

“For answer to the third charge made in complainant's bill and the specifications thereunder, defendant —

“(1) Denies that in its rates charged by it for services rendered or to be rendered by it for the transportation of said oils for complainant and the said Standard Oil Company from Cincinnati, O., to points or any point reached by the defendant's line of railroads in States other than Ohio and Kentucky, it has, since April 5, 1887, uniformly or at all made or given undue or unreasonable preferences or advantages to said Standard Oil Company or to certain or any localities on its lines of railroad, nor has it subjected complainant or certain or any localities on its lines of railroad to undue or unreasonable prejudices or disadvantages.

“(2) Defendant says, in reference to the difference in rates to complainant and Standard Oil Company respectively, appearing in specifications No. 1 and No. 2, under the second charge in complainant's bill of complaint, it denies that said differences are not measured, but avers that they are, by the differences in circumstances surrounding these shipments respectively ; and defendant denies that the difference to it in the cost and expense and convenience of transportation of such oils for complainant and the Standard Oil Company respectively, or that the difference between the circumstances under which complainant and said company respectively ship their oils, do not, but it avers that they do, justify the difference in rates made to said parties respectively, and it denies that they are either small or insignificant in comparison with the differences in the rates so charged ; and defendant says that said rates so made for the shipment of the oils for the Standard Oil Company were made for shipment of oil to be made in large and regular shipments in iron tank-cars, which tank-cars were to be furnished and the cars kept in repair by said Standard Oil Company free of expense to defendant, which oil was never on defendant's premises and there at its risk, and by which cars defendant was furnished with return loads, while the rates thus made to complainant were made in reference to the shipment of oil in barrel packages, in small quantities and irregular shipment, to be received and loaded by defendant at its expense, and held at its risk while on its premises, and the cars used for barrel shipment were thus greatly injured and rendered of less value to defendant for general purposes, and were returned usually empty ; so that, as this defendant

believes and charges, the circumstances and conditions under which the shipments of oil for the Standard Oil Company were made were dissimilar from the circumstances and conditions under which the oil for complainant was shipped, as to justify and authorize the difference in rates to said Standard Oil Company and to complainant made, as aforesaid.

"(3) Defendant says it is not true, and it denies, that it owns or ever did own any tank-cars, or that it ever furnished to said Standard Oil Company such cars, or that it refuses or ever refused to furnish such cars to complainant, or that he ever applied for such; but defendant says if complainant had applied for such cars, he would have been refused, for the reason that defendant did not and does not own or have such cars.

"(4) Defendant admits that it has since April 5, 1887, in its freight rates, charged a higher rate per hundred pounds for transportation of oil in barrels than for oil in tanks, except when the competition with water lines and railroads or competition between markets or products has forced a reduction in rates on oil in barrels to the same or nearly the same rates charged upon oil in tank-cars; but it is not true, and defendant denies, that the difference between the cost, expense, and convenience of transportation of oil by the two methods has been out of proportion to the difference between the rates by the two methods, and denies that said difference in expense, cost, and convenience is slight or insignificant, but, on the contrary, defendant avers that they were so great as to justify, as it believes, the difference in rates charged.

"(5) Defendant admits that complainant ships in barrels all the oils he ships over this defendant's lines of railroad; but it is not true, and it denies, that the Standard Oil Company ships in tank-cars almost all the oil which it ships over defendant's lines of railroad. Defendant says that said Standard Oil Company, since April 5, 1887, has shipped over its lines of railroad in barrel packages, car-load shipments, a much greater quantity of oil than complainant has, and at the same price from and to the same points, and it has shipped over its lines of railroad during that period about twice as much oil in barrels as it has shipped in tank-cars.

"(6) Defendant admits that the rate of transportation of oil from Louisville to the following destinations are the same whether the oil is carried in barrel packages or in tank-cars; to wit, Mobile, Ala., Meridian, Miss., Jackson, Tenn., New Orleans, La., Jackson, Miss., Vicksburg, Miss., and that the rates are the same for shipments from Cincinnati to Nashville, Tenn., and Mobile, Ala.; and such is true, not as a

matter of choice of this defendant, but because the competition with water lines, directly and indirectly, at said points, or competition with railroad lines or between markets or products, reduced the rates for shipment of oil to these points to the regular rates of shipment of oil in tank-cars.

"(7) Defendant admits that since April 5, 1887, it has charged for the transportation of oils from Cincinnati and from Louisville to Birmingham, Ala., Calera, Ala., Montgomery, Ala., and Selma, Ala., the same freight rate in all cases to each of said points, and that the distance from Cincinnati and Louisville by its road is to Calera 33 miles greater than to Birmingham, and to Montgomery is 63 miles greater than to Calera, and that oils transported over its lines of road from Cincinnati or Louisville to Montgomery are carried through Birmingham and Calera, but not through Selma, nor is Selma on defendant's lines of railroad; but said rates were not made nor are they controlled by this defendant. The same are fixed and regulated by the competition with water-ways and railroad lines over which defendant had and has no control, and are in and of themselves fair, just, and reasonable.

"For answer to the fourth charge made in complainant's bill and the specifications thereunder, defendant —

"(1) Denies that it has, since April 5, 1887, charged or received for the transportation by it of such oils from Cincinnati or from Louisville, to points reached by its lines of railroad in States other than Ohio and Kentucky, a greater compensation in the aggregate for a shorter than a longer distance on the same line in the same direction, where the shorter was included within the longer distance, and whose transportation being under substantially the same or similar circumstances and conditions.

"(2) Defendant admits that the charges made by it for shipments of oil from Cincinnati and from Louisville to the various points set out in complainant's bill under this charge, and the distance to each of said points from Cincinnati and Louisville respectively, is as given by complainant in its first and second specifications under the fourth charge in his bill, with the exception that the rate from Cincinnati to New Orleans should be 34 cents per hundred pounds, and to Mobile the same, and the distance from Louisville to Mobile is 670 miles, and the rates should be from Louisville to New Orleans, 30 cents per hundred pounds, to Birmingham, $45\frac{7}{10}$, and to Mobile, 30 cents; but defendant says that said respective shipments to said several points were made under the very dissimilar circumstances and conditions as aforesaid, justifying and authorizing, as it believes,

the different rates charged to the different places as aforesaid.

“(3) Defendant denies that any of the alleged discriminations against complainant, or the alleged unreasonably high and unjust charges against him set out in his bill of complaint, have had any effect or were designed to affect or to give to said Standard Oil Company a monopoly of the traffic in such oils at the points or any points reached by its lines of railroad, or to exclude complainant's products from nearly all or any of aforesaid points; and it denies that such alleged discriminations or charges, or both, have been made by defendant at the dictation of the Standard Oil Company; and it denies that by reason of such alleged discriminations or such alleged unjust and unreasonably high charges, or both, complainant has been injured in his business, or that thereby he has lost profits that he would otherwise have realized.

“Whether complainant in all other respects than for said transportation during all or any of the time since April 5, 1887, has had ample facilities, or what facilities it has had, for the transaction of a large or a profitable business in the sale of said oils in said markets; or that, but for said alleged unjust and unreasonable charges and alleged unjust discriminations, complainant would have prosecuted such with profit to himself, defendant does not know and cannot state from its belief or otherwise.”

All the other petitions were filed simultaneously with the one above mentioned; that is to say, July 22, 1887.

The pleadings in the other cases it is deemed sufficient to present in brief synopsis.

The petition against the St. Louis, Iron Mountain, & Southern Railway charges that defendant violates the Act to regulate commerce, —

1. By making charges for services to be rendered in the transportation of petroleum oils from St. Louis, Mo., to points on its line in the State of Arkansas which in themselves are unreasonably high.

2. By having, ever since April 5, 1887, charged complainant for services to be rendered by defendant in the transportation of such oils for complainant from St. Louis, Mo., to points in other States, a greater compensation than it has charged the Waters-Pierce Oil Company of Missouri for like and contemporaneous services.

3. By having, since April 5, 1887, in its charges for the transportation of such oils, uniformly given undue and unreasonable preferences and advantages to said Waters-Pierce Oil Company of Missouri, and subjected complainant to undue and unreasonable prejudice and disadvantage.

The answer of this defendant meets the charges with full and specific denial.

In the case against the Mobile & Ohio Railroad Company, the issue was so far narrowed by a stipulation of the parties hereinafter given, as to render unnecessary any statement of the pleadings in this place.

In the case against the Cincinnati, New Orleans, & Texas Pacific Railway Company, the charges are, that defendant has violated the provisions of the Act to regulate commerce, —

1. By making charges for services to be rendered in the transportation of petroleum oil from Cincinnati, O., to points on its road in other States than Ohio, which in themselves were unjust and unreasonably high.

2. By charging complainant for services to be rendered in the transportation of petroleum oil a greater compensation than it charged the Standard Oil Company of Kentucky for like and contemporaneous services.

3. By having, in its rates charged for services rendered and to be rendered for the transportation of said oils for complainant and said Standard Oil Company of Kentucky, uniformly made and given undue and unreasonable preferences and advantages to said Standard Oil Company, and subjected complainant to undue and unreasonable prejudice and disadvantage.

The answer meets the charges with a full and specific denial.

The petition against the Cincinnati, New Orleans, & Texas Pacific Railway Company, joined with the Alabama Great Southern Railroad Company, charges a violation of the said Act to regulate commerce, —

1. By making charges for services to be rendered in the transportation of petroleum oil in themselves unjust and unreasonably high.

2. By having, in the rates charged for services rendered and to be rendered in the transportation of petroleum oil for complainant and the Standard Oil Company of Kentucky respectively, uniformly made and given undue and unreasonable preference and advantage to said Standard Oil Company, and subjected complainant to undue and unreasonable prejudice and disadvantage.

4. By having charged, for the transportation of petroleum oil from Cincinnati to points reached by defendants' roads, a greater compensation in the aggregate for a shorter than for a longer distance over the same line in the same direction; the shorter being included in the longer distance, and the transportation being under substantially the same circumstances and conditions.

Defendants meet the first and second charges by denial; and

they also deny that since the expiration of the order of relief made on their behalf on the nineteenth day of April, 1887, they have made the greater charge for the shorter haul of the same property in the same direction, the shorter being included in the greater distance.

The petition against the Mississippi & Tennessee Railroad Company charges violation of the Act to regulate commerce by making charges for the transportation of petroleum oils from Memphis, Tenn., to Grenada, Miss., which are in themselves unreasonably high.

The answer justifies the charges.

The petition against the Newport News & Mississippi Valley Company, and the Louisville, New Orleans, & Texas Railway Company, charges violation of the Act to regulate commerce, —

1. In making charges for services rendered and to be rendered by defendants in the transportation of petroleum oils from Louisville, Ky., to Vicksburg, New Orleans, and other points, which in themselves are unjust and unreasonably high.

2. By having uniformly, since April 5, 1887, made and given undue and unreasonable preference and advantage to the Standard Oil Company of Kentucky, and subjected complainant to undue and unreasonable preference and disadvantage.

The defendants answer separately with specific denial.

The petition against the Newport News & Mississippi Valley Company, and the Illinois Central Railroad Company, charges a violation of the Act to regulate commerce, —

1. By making charges for services rendered and to be rendered by defendants in the transportation of petroleum oil from Louisville, Ky., and points on their lines in other States, which were in themselves unjust and unreasonably high.

2. By having, in the rates charged by them for services rendered and to be rendered for complainant and for the Standard Oil Company of Kentucky, uniformly made and given undue and unreasonable preference and advantage to said Standard Oil Company, and subjected the complainant to undue and unreasonable prejudice and disadvantage.

The charges are fully met and denied by the answers.

The petition against the Illinois Central Railroad Company charges a violation of said Act to regulate commerce, —

1. By making charges for services to be rendered in the transportation of petroleum oils from Cairo, in the State of Illinois, to points on its line of railroad in other States, which were in themselves unjust and unreasonably high.

2. By having, since July 9, 1887, charged and received for the transportation of petroleum oils from Cairo, Ill., to points reached by defendant's line of railroad in other States, a greater compen-

sation in the aggregate for a shorter than for a longer distance over the same line in the same direction; the shorter being included in the longer distance, and the transportation being under substantially the same circumstances and conditions.

The answer denies the first charge, and denies that the greater charges made for shorter than for longer hauls over the same line in the same direction are made under substantially similar circumstances and conditions.

Such were the issues made in the several cases.

The testimony upon which the cases have been submitted was taken in the main on oral examination of witnesses at the public sessions of the Commission, and the fullest opportunity was given for bringing out all the facts. The officers of the defendant companies connected with the freight departments of their roads respectively were examined, and the workings of the roads, so far as concerns this particular article of traffic, were fully gone into, with the purpose on the part of the Commission to ascertain, if possible, not only whether any of the defendants had been guilty of unlawful discrimination against the complainant in the particulars charged, but also whether the general course of the defendants in respect to the transportation of oil was relatively fair and just as between different shippers, and also as between the defendants and the general public.

The case of two of the defendants was, however, so different as to make them stand altogether apart from the main contest which was made by the others, and to which the evidence was directed. It will, therefore, be most convenient to say in respect to them, in this place, all that we think there is occasion to say at this time, and afterwards to dispose of the others together.

In the case of the Mobile & Ohio Railroad Company, counsel for the respective parties have signed and filed the following paper:—

“It is hereby understood and agreed by and between George Rice, complainant, and the Mobile & Ohio Railroad Company, defendant, in the above-entitled cause, that the complainant makes no objection to the rates of the defendant for transporting coal oil over its line of railroad, as specified and shown in the third paragraph of the answer of the defendant to the petition of the complainant, except that said specification of rates shows that the defendant charges less for the transportation of oil from Cairo, Ill., to Mobile, Ala., than it does to points between Mobile, Ala., and Cairo, Ill.

“It is further understood and agreed that the defendant admits that its rates for the transportation of oil over its lines from Cairo, Ill., to Mobile, Ala., are less than the rate for like trans-

portation of oil from Cairo, Ill., to points between Cairo, Ill., and Mobile, Ala.

"It is further understood and agreed, that the defendant claims that the rate for the transportation of coal oil to Mobile, Ala., is fixed by water competition in connection with the short rail haul from New Orleans, La.

"It is further understood and agreed, that the defendant claims that it is authorized to make the less charge for transporting oil in cases like Mobile, Ala., by the terms of the provisions of the fourth section of the Interstate Commerce Act."

The question which this paper undertakes to submit to our decision concerns other carriers and their customers quite as much as it does these parties, and a decision upon it would be far-reaching in its consequences. This fact of itself would be ample reason why we should proceed cautiously in any consideration we should give it, and why we should require from a party raising it a very full presentation of such facts as would have legitimate bearing upon it.

A full presentation was not made on the hearing; the matter received very little attention, and the facts were very imperfectly brought out. We could not intelligently dispose of the question on the facts now in proof, and it would be unjust to parties not now before us to make any attempt to do so. Under the circumstances, therefore, we shall make no order in this case, leaving the parties to bring the subject to our attention hereafter as they may think they have occasion. This disposition of the case for the time being decides nothing, and concludes no one.

What is said on this subject is equally applicable to each of the other causes in which a violation of the long-and-short-haul rule of the fourth section of the Act was charged. In none of the cases was special attention given to this feature of the controversy on the hearing, or any such examination of the facts gone into as would assist the Commission to safe judgments. Other charges were contested sharply and persistently, but this particular charge was scarcely noticed. Under such circumstances, if we were to pass judgment upon it, it would be necessary to institute further inquiries and make investigations on our own behalf; and this we think uncalled for in this controversy at this time. If a decision upon it is deemed important, it may be assumed the parties, when it suits their convenience, will renew the subject, and present the considerations which bear upon it more fully.

The other of the two cases mentioned is that of the Mississippi

Questions raised by paper signed by counsel for Mobile & O. R. Co. not decided.

Allegations of violation of long-and-short-haul clause not determined.

& Tennessee Railroad Company, in which the only matter put in issue was whether the rates charged upon barrel oil from Memphis, Tenn., to Grenada, Miss., are reasonable. The shipments made over defendant's road are very few, and have been mostly made by others than complainant. It does not appear that others are complaining. Upon the question of reasonableness the case is almost entirely without proof. Complainant relies upon the three facts, that the rates are higher than generally prevail elsewhere, that they were formerly lower on this road, and that the defendant now carries the same commodity to points beyond Grenada at lower rates. The first two grounds of objection are not very conclusive. It is probable that defendant could not support a useful existence if it were compelled to measure its charges by those made by carriers whose lines command a heavier and more steady business. It is also not unlikely that this defendant at times has made rates it could not abide by permanently without bankruptcy. Most of the railroad companies of the country at some time or other have done so.

No order made as to reasonableness of rates in case of Miss. & Tenn. R. Co.

The third ground presents the same question which, in the case of the Mobile & Ohio Railroad Company, we declined to decide without some showing to enable us to see how the decision would affect the railroad business of the section. We are absolutely without any such showing in this case; and we think it entirely reasonable and proper, therefore, to decline to make any order.

We now proceed to dispose of the cases of the other defendants; and, in doing so, it is to be understood that when the term "defendants" is made use of, it applies to those only whose cases are under consideration, and does not include the Mobile & Ohio and the Mississippi & Tennessee Railroad Companies, or either of them.

To whom term "defendants" applies in opinion.

From the evidence it appears — and we find the fact to be — that there are two general methods for the transportation of petroleum oil and its products by rail, — the one being in barrels holding an average of fifty gallons, and the other being in large iron tanks which are permanently fixed upon flat cars so as to constitute a part of the cars themselves. Some oil is carried in cans also, but that method does not come in question in these cases. The tanks vary greatly in size, some holding not more than three thousand gallons, or sixty barrels, while others hold twice that quantity. The refined oil, which is the kind that constitutes the subject of controversy in these cases, weighs six and a half pounds to the gallon; the barrels in which the oil is shipped weigh about seventy-five pounds each, and a barrel with its contents about four

Further facts set out.

hundred pounds. The tank-cars which are sent into the territory in which the defendants operate are all either owned by the shippers themselves or are procured by them from some other source than the railroad companies, the latter never having supplied themselves with rolling-stock for the purposes of this traffic. The Louisville & Nashville Railroad Company and the Cincinnati, New Orleans, & Texas Pacific Railway Company, are severally owners of the trucks and bodies of a few tank-cars; but even of these, the tanks are owned by the Standard Oil Company of Kentucky, so that they are not offered for use to shippers in general.

In the rate-sheets which are published by the defendant, rates are named for the transportation of oil in barrels and oil in tanks; the latter, however, not to all points, but in general only to the points at which preparations have been made by a shipper to receive and store the oil shipped by that method. In some cases rates are named to points where no such preparations are made; the reason for which, if there is any, has not been very clearly explained to us. Generally the rate when the transportation is in tanks is by the car; but where it is in barrels, it is by the barrel, in car-load lots, or by the hundred pounds. None of the rate-sheets of the defendant which were put in evidence notified the shipper that the carrier was not prepared to furnish rolling-stock for transporting the oil in either mode; a reasonable inference from the rate-sheet not otherwise explained would be that it was. Thus, the Newport News & Mississippi Valley Company, by tariff D 377, gives rates as follows: Louisville, Ky., to Memphis, Tenn., coal oil, car-load, in barrels, 45 cents; coal oil in tanks, per tank-car, \$25.

If, however, the owner of oil at Louisville should desire to send a consignment of oil in tanks to Memphis, and should apply to have cars furnished him for the purpose, he would be told at once that the company did not supply tank-cars to its customers; that, if they desired to avail themselves of that method of transportation, they must not only pay the rate prescribed, but they must also furnish the company with the cars. This is obviously a most important qualification of the rate itself; and if the shipper

Understanding among roads as to party furnishing tank-cars. must furnish the car at his own expense, the actual cost to him of the transportation will very much exceed the published rate. This, however, does not seem to be generally expected; on the contrary, there

seems to be a general though not a universal understanding among railroad companies in the south-west, including the defendants, that the party furnishing a tank-car shall be paid trackage for its use at the rate customary among railroad companies, namely, three-fourths of a cent a mile going and returning,

with the privilege on the part of the railroad company of loading the car with return freight when any is offered or is procurable.

One difficulty with this understanding is, that it does not appear in the rate-sheets. The sixth section of the Act to regulate commerce provides that "every common carrier subject to the provisions of this Act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad, as defined by the first section of this Act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges, and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates and fares and charges.

**Rate-sheets.
Sixth section of
the Act.**

The purpose of this provision is very manifest, and is well understood. It intends that every person desiring to avail himself of the facilities afforded by the railroads of the country should be enabled to tell for himself, without being under the necessity of calling in the aid of any railroad agent or other persons, what charges he must pay for the transportation of his person or his property, and also have in the published rate-sheets an accurate test of the correctness of any exaction. The rate-sheets introduced by the defendants in these cases can hardly be said to give this information. They omit to give a rule, regulation, or understanding which has very important bearing on the rates, and they wholly omit to notify the owner of oil that the carriers making them do not furnish him with cars for one of the methods of transportation which in terms they offer to him. The rate-sheets, therefore, require to be supplemented by other information, and it is from this fact that some part of the controversy between these parties has arisen.

**Purpose of the
provision.
Deficiency of
defendant's
rate-sheets.**

It was said on the argument that the railroad companies were under obligation to furnish tanks no more than they were to furnish barrels; that tanks and barrels were only different kinds of caskets for holding the property which was to be conveyed, and it was matter of course that the shipper should furnish them for himself. This might be quite true if the tank, like the barrel, was received from the consignor, and taken for delivery to the consignee, as packages usually are; but it is not. It is, on the other hand, a part of the car itself, as much as are the

**Obligation of
company to
furnish tank.
Rates to party
proposing to
ship in tank.**

sides to an ordinary box car ; it is provided only to hold the oil for transportation, while the barrel holds it both before and after shipment, as an article of merchandise, and is bought and sold with it. The shipper in barrels, it is quite true, is expected to deliver his merchandise in that form of package, and the rate-bill informs him what he must pay upon it. The party proposing to ship in tanks does not receive from the rate-sheets equivalent information ; and if outside the rate-sheets he learns that he must furnish the tank-cars, he is still unapprised upon what terms this is to be done, and must seek the information from the officers or agents of the carrier.

But when he seeks this information, he learns immediately that the matter is or may be the subject of private negotiation, and perhaps of different terms in different cases. Thus the evils at which this provision of the statute was aimed make their appearance immediately. He is not informed by the rate-sheets what he will be charged for the service to be rendered him, and when he seeks the information he finds the terms are to be the subject of bargain ; but a bargain implies a difference in terms in different cases. We are not to be understood as finding or as intimating an opinion that all of these defendants have made different terms in different cases. The evidence as to the most of them has no tendency to establish against them such a charge. We say only that as they have not by their rate-sheets bound themselves to any particular terms, the precise terms must be fixed in some other way. If any one carrier has a definite and uniform practice on the subject, it will not be chargeable with discrimination while the practice is followed ; but uniformity of practice, while it shows correct motives, does not excuse a failure to give full information to the public in the rate-sheets.

In the case of the Louisville & Nashville Railroad Company, however, it clearly appears that the private arrangements made for the use of cars have been different in the case of different shippers, and that it has no definite rule on the subject. The general freight agent of that road, being on the stand, was asked, —

Evidence of private arrangements in case of Louisville & N. R. Co. “What do you charge for bringing these empty tank-cars back from the South? What would you charge Mr. Rice?”

Answer. “Not less than a cent and a half ; we might charge three cents. If he wished to make arrangements with us now, we should probably charge him a cent and a half, or might charge him three cents. It would depend on the section of the country to which he wanted to ship.”

A little farther on he is asked by a member of the Commission, —

"When these tank-cars go South, do you take the risk of getting a load back, or do you perform your contract when you take the oil to the place of destination, leaving the car there? I want to know what your contract covers. You advertise to take the oil for so much. Does that mean simply delivering the oil at the place of destination, leaving the other party to get the car back?"

Answer. "Our rate on oil applies only to the shipment of that oil, but we are influenced in making that rate by the prospect of return loads."

Question. "If you get no return load, is the expense of hauling the empty car back, if you choose to charge it, charged to the shipper?"

Answer. "If there were not generally return loads, we would then insist upon getting pay for hauling the car back."

Question. "You charge so much for hauling oil from Louisville to Montgomery, and, when you deliver it there, that completes your contract, and you leave the car there if you please?"

Answer. "Yes, sir."

Question. "And are not under obligation to bring the car back?"

Answer. "No, sir."

Question. "And then the bringing the car back is matter of contract between you and the shipper?"

Answer. "Yes; but if you will let me explain—a great portion of the return loads for these cars is furnished by the shippers of coal oil. The shipments of cotton-seed oil are not furnished by the shippers of coal oil; but the cars that carry down the petroleum oil, by arrangements with parties down there, have the tanks sent back with return loads of cotton-seed oil. I know of one case in which a firm in Louisville receiving cotton-seed oil made an arrangement with the owners of forty-six cars to return them filled with cotton-seed oil."

Question. "Suppose a man comes to you to make a contract with you for transporting oil to Mobile or Montgomery, is your contract performed when you reach the destination, and may you leave the car there?"

Answer. "Yes; we have then performed our contract, and may leave the car there."

Question. "And in respect to bringing that car back, it would be matter of arrangement or contract between you and him?"

Answer. "Yes, sir; a separate transaction."

Question by counsel. "As a matter of fact, whenever they cannot get a return load, you do haul them back free, do you not?"

Answer. "We have hauled a few free."

Question. "Have you not hauled all that did not contain a return load free?"

Answer. "We have hauled free all that did come back empty for some time."

Question. "And in every instance where there is no return load, you haul back the empty car free?"

Answer. "Yes; but those are a small percentage."

There is also evidence that two at least of the other defendants are without a uniform practice on this subject, and the general freight agent of another is not able to say how it is with his company; but whether the other defendants do or do not observe uniformity in their dealings with this subject, it is plain that, in failing to give full information by publication, abundant opportunity for discriminations is left to agents, and it will be surprising if these are not sometimes availed of, when, perhaps, the agents suppose they are acting entirely within the scope of their general authority to make contracts.

We are now to see whether these defendants, or any of them, have been guilty of the unjust discrimination and of the making of excessive rates which are charged against them.

The unjust discrimination in the case of transportation east of the Mississippi is supposed to have had for its object the

The Standard Oil Trust.
Large capital and immense power.

giving of an advantage to the Standard Oil Company of Kentucky, and that in the case of transportation west of the Mississippi to have been designed to favor the Waters-Pierce Oil Company of St. Louis. Both these companies are spoken of as Standard Oil

Companies. It was testified before us that a controlling interest in each of them is held by the Standard Oil Trust. This evidence was given by one of the trustees of the Trust, who also testified that the capital represented by the Trust was about ninety million dollars. Another witness, who assumed to have some knowledge on the subject, estimated the actual cash value of this capital at one hundred and fifty millions. Whether the one estimate or the other is the correct one, this is an immense property to be under the control of eight trustees, as this appears to be. It represents a great number of prosperous establishments in different parts of the country, and it gives an immense power which is capable of being so employed as to put all competitors at a great and perhaps ruinous disadvantage. It is of the utmost importance, therefore, that the several railroad companies which are patronized by them should not only abstain from granting to those who wield this power any special and peculiar privileges, but should as far as possible avoid giving cause for suspicion that they are so doing.

It is but just to the defendants in these cases to say that no evidence was given tending to show that they had favored the Standard Oil Companies specially as distinguished from other companies, firms, or individuals who shipped their oil in tank-cars; for the discriminations which appeared on the hearing, and which were relied upon as establishing the charges made in the complaints, operated, not in favor of the Standard Oil Companies alone, but of all shippers in tanks. The Standard Oil Companies, however, were shown to be much the largest shippers of oil in this mode, and therefore would be most largely benefited by discriminations against the shippers in barrels.

Discrimination not specially in favor of Standard Oil Co., but shippers in tank-cars.

In making proof of discriminations charged, reliance was had in part on the great differences shown by the published rate-sheets between the charges made for the transportation in tanks and in barrels; the latter being almost invariably very much higher. This it was claimed was in itself illegal, not being justified by any difference in cost or by other facts or circumstances. The fact that a uniform charge was made for the transportation of tank-cars, regardless of capacity, was also relied upon as proof tending in the same direction.

Difference in charges for transportation in tanks and in barrels.

In turning our attention to this question of discrimination, we are at the outset confronted with a jurisdictional objection which is interposed on behalf of one of the defendants, and which, if valid on its behalf, is equally a protection to all the others, even though they do not themselves advance it in argument. The objection is one which goes to the lawful authority of the Commission to make inquiry into the relative equality and justice of the rates charged for the transportation of oil in barrels and oil in tanks respectively. The point is so important, that it is deemed proper to state it in the exact words of counsel.

Same. Jurisdiction of Commission to inquire into subject.

“This case,” it is said, “involves the question whether the Act to regulate commerce confers upon this Commission jurisdiction to inquire into the relative reasonableness of rates which a common carrier may have adopted in good faith for transporting the same traffic in different modes.”

Counsel's statement of the point.

“The question assumes that the carrier, in adopting the different modes of transportation, and in fixing the different rates therefor, has not, acted capriciously or maliciously, but in good faith, according to its best judgment, with a view to subserve what it regards its best interests.”

"The question also assumes that the carrier offers the different modes of transportation, with their corresponding rates, equally and impartially to all shippers alike ; that it is possible for the class of persons usually engaged in that particular traffic to conform to either of the modes of transportation, and that the highest rate charged for either mode of transportation is 'reasonable in and of itself.'

"By the expression 'reasonable in and of itself,' is meant that the highest rate charged by the carrier is no more than a reasonable compensation for transporting the traffic in the mode for which that rate is charged, and that the only ground for claiming it to be unreasonable is, that it is higher than another rate which is charged by the same carrier for transporting the same traffic at the same time between the same points, but by a different mode of transportation.

"It will be conceded that this Commission was created by the Act of Congress 'to regulate commerce;' that it has no jurisdiction except such as is conferred by that Act; and that its jurisdiction, so far as this question is concerned, must be found in the first, second, or third section of said Act, or that the jurisdiction does not exist at all.

"The first section enacts that 'all charges made for any service . . . shall be reasonable and just.'

"This section does no more than announce a well-settled rule of the common law; but as the United States, regarded as a government distinct from the States, had no common law of its own, it required an Act of Congress to adopt the common-law principle into the law of the Union regulating interstate commerce.

"But while the common law did require that all the charges of a common carrier should be 'reasonable,' it did not require that they should be *equal*, even where the service was the same, nor that they should be *proportioned* to the service, where the service differed in different cases.

"At common law, if the rate charged A was *reasonable in and of itself*, he could not complain, even though the carrier might render precisely the same service to B free of any charge whatever; and it was to remedy this defect of the common law that the English Parliament passed the Act of 8 and 9 Vict., chap. 20, known as the Railway Clauses Consolidation Act of 1845.

"The word 'reasonable,' as used in the *first* section of the 'Act to regulate Commerce,' is used in the same sense in which it was used at common law, viz., reasonable 'in and of itself,' without regard to whether a low rate was or was not charged for the same or a similar service.

"I concede that the Commission may, under the *first* section,

determine whether the rate upon coal oil in barrels is *reasonable* or right 'in and of itself;' viz., *whether it is a fair compensation for that particular mode of carrying coal oil.*

"But I deny that the Commission can, under the *first* section, lawfully declare the rate upon barrels to be unreasonable *merely because a lower rate is charged upon tanks*, even though the Commission should find that the difference in rates is greater than the difference in the cost, etc., of the two modes of transportation.

"I admit, that, where different rates are charged, the Commission may, under the *second* section of the Act, determine whether the rates are charged for services which are 'like and contemporaneous,' and whether they are rendered under substantially similar circumstances and conditions; but I deny that the Commission has any power under the *first* section to declare that a rate is not *reasonable* merely because it is higher than another rate charged by the same carrier for a different service, even though both services may be rendered under substantially similar circumstances and conditions.

"I also admit, that, where different rates are charged, the Commission may, under the *third* section, determine whether such difference in rates 'makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic;' but I deny that the Commission has any power, under the *first* section, to declare that a rate open to all persons is not *reasonable*, merely because it gives an advantage to the person who accepts it over another person who voluntarily selects a different mode of transportation for which a higher rate is charged.

"A mere difference of rates may in many cases constitute a violation of sects. 2 and 3, but it can never constitute a violation of sect. 1, of the Act.

"It matters not how great the difference between two rates may be, it can never amount to a violation of sect. 1 if the higher rate is '*in and of itself reasonable and just*;' i.e., only a fair compensation for the service for which that particular rate is charged.

"The fact that sects. 2 and 3 of the Act give to the Commission ample powers in regard to *differences* in rates, is strongly persuasive that sect. 1 was intended to be confined to the reasonableness of rates."

In support of these views cases are cited, and particularly *Nicholson v. Great Western R. R. Co.*, 1 Nev. & Mac. 148, and *Great Western R. R. Co. v. McCarthy*, 29 Am. and Eng. R. R. Cas. 87.

The question thus presented is one of considerable importance,

and it is forcibly and ingeniously argued in an elaborate brief. It is seen that it assumes at the outset "that the different modes of transportation with the corresponding rates are offered equally and impartially to all shippers alike ; that it is possible for the class of persons usually engaged in that particular traffic to conform to either of the modes of transportation ; and that the highest rate charged for either mode of transportation is reasonable in and of itself."

This assumption makes the resort to the one method of transportation rather than the other a matter purely of voluntary choice on the part of the shipper ; and if the argument is correct in further assuming that the two methods are equally open to all who usually engage in the business, it may justly be urged with very great force that the party resorting to the one is by the choice itself precluded from raising any question of relative

reasonableness by comparing the rates he chose with the lesser rates he might have chosen, but did not. It is conceded in the statement of the question that no two kinds of traffic are in question, but only one kind of traffic conducted in different ways. The merchandise in question is a single or identical article, and the purpose of the transportation is to deliver the commodity to consignees whose competition in the sale of it will be wholly unaffected by the method in which it has been brought to them. Whether it has come in barrels or in tanks is immaterial when the owner offers it in market : he can place no higher price upon it in the one case than the other. It is therefore obvious, that if a heavier burden is laid upon one method of transportation than is imposed upon the other, it must, under ordinary circumstances, be impossible for those who adopt the first method to succeed in the competition when they meet the others in the same markets. Their interest, therefore, in the charges which are made to their competitors is obvious. Unreasonably low charges to their competitors would be as fatal to their success as unreasonably high charges to themselves.

The most important question that arises upon the assumptions made as the basis for this argument is, whether there are, in fact, two different modes of transportation which are offered, with their corresponding rates, equally and impartially to all shippers alike, and which it is possible for the class of persons usually engaged in the traffic freely to choose between. If no such offer is in fact made, we have no occasion to follow the reasoning of the argument.

Unless we wholly misapprehend the real situation, when the rate-sheets of these defendants are presented to the class of per-

Two methods of transportation offered. Voluntary choice of shipper. Unequal burdens.

Whether two methods of transportation are offered equally to all. Shippers of small means.

sons usually engaged in the traffic, the assumption that two different modes of transportation are offered to them equally and impartially is baseless. No one of these defendants offers two modes of transportation in the same sense in which it offers its facilities for transportation to shippers of other commodities. Each of them supplies rolling-stock for one method only, and that one is shown to be the method on which, by their rate-sheets, the heaviest burdens are imposed. No such choice is given to adopt the other mode as would be implied from the language used in stating the question; on the contrary, an applicant for that method of transportation would be told he must furnish his own rolling-stock, and this means very much more than might seem to be indicated by this statement: it means, if he would make his business a success, that he shall supply himself with a very considerable number of cars, costing perhaps \$700 each, and that he shall also have stationary tanks at the points to which his shipments are to be made. The cost of the necessary terminal facilities which he must supply for himself we have no means from the evidence in these cases of comparing with the cost of making provision for the storage of barrels by one who adopts that method. It was testified that the terminal facilities of the Standard Oil Company of Kentucky at Selma, Ala., cost about two thousand dollars, and at New Orleans about twenty thousand. The vice-president of the Waters-Pierce Oil Company estimates the average cost of putting up stationary tanks to accommodate tank shipments, including side-tracks, etc., to be from \$1,000 to \$50,000, according to the requirements of the station, except at St. Louis, where he estimates it at \$250,000. It is obvious, we think, from the facts stated, that instead of the defendants offering two methods of transportation which are open to the acceptance of all, they offer only one which is so open. The other is offered on such terms that it can by possibility be accepted only by parties who can control a considerable capital, and who will supply for themselves an important part of the means of transportation, and also supply terminal facilities. The man of small means who adopts the method of transportation in barrels cannot be said to do so of choice when the failure of the carrier to supply for the other the customary means of transportation compels him to do so.

It was said on the argument that this compulsion was not the fault of the carriers, since it resulted from the man's own circumstances; and it was very justly remarked that it is not the business of carriers to relieve against inequalities in the pecuniary condition of those who give them business. This is perfectly true. If one man can pay the extra charge which is made for being transported in a palace car, and chooses to do so, the fact

constitutes no ground for complaint on the part of another man who, by reason of want of means to pay for the like accommodation, is compelled to ride in the common car. When the carrier provides accommodations for all, and offers them impartially, he stands blameless as to those whose circumstances preclude acceptance; but that is not the case we have before us. The carriers do not provide accommodations for the two methods of transportation; they provide them for one method only, and in doing so they fall short of what, in respect to all other kinds of traffic, is practically the universal custom. It is from this fact that the oppression complained of in these cases springs. The carriers offer no choice to their customers; they fail to provide for the general use of all who may desire it the rolling-stock for transporting in the way which they say is most profitable to themselves this very large traffic, but they give to the dealers who will perform this duty for them rates so favorable as to put those who adopt the only method the carriers provide at such disadvantage as to preclude successful competition.

It does not seem to us either just or plausible to say under such circumstances that the person whose oil is carried in barrels has voluntarily chosen that method, and has no concern with the charges imposed on his competitor who adopted the other. He is, on the contrary, vitally concerned with those charges; and if his own are not to be gauged in some degree by them, he may be ruined in his business without redress, even though the charges he pays, when considered by themselves, may seem not unreasonable.

But it is further seen, that the whole argument on this branch of the case is rested by counsel on the proposition that the charges made on transportation of oil in barrels are reasonable in and of themselves; if they are found not to be, the jurisdictional difficulty which is suggested need not further occupy our attention.

It is to be regretted that we are not more clearly shown, in the argument presented on this point, how we may determine when rates are, and when they are not, in and of themselves reasonable. When a limitation of power depends upon facts, there ought to be no question what facts are to be considered, since otherwise the limitation is likely to be the subject of continual dispute, and may possibly be exceeded, even when the intention is to observe it with due care; and especially when such a limitation depends upon a pecuniary charge being reasonable or the reverse, the tests of what is reasonable ought to be such as not only can be easily applied, but as in themselves are open to no controversy.

Counsel has defined the expression "reasonable in and of

itself" to mean "a reasonable compensation for transporting the traffic in the mode for which the rate is charged ;" but the definition throws little or no light upon the question how this reasonable compensation is to be measured and determined.

Definition of expression.

It is sometimes contended, though not by the carriers themselves, that we may measure the reasonableness of charges by the cost of transportation. The defendants will not contend that that is a proper test, for their whole practice is against measuring their charges by the cost. It may cost no more to carry a box of silk weighing a hundred pounds than a bale of refuse rags of like weight, but the charge will, perhaps, be several times as great ; and the carrier justifies the discrimination by showing that equal rates on both would put transportation of the less valuable article out of the question. Like discriminations are made everywhere ; property is classified with a purpose, among other things, to make the most valuable kinds pay most largely for the service performed. This is a wise if not a necessary policy ; and, as the railroads adopt it universally, they are fairly estopped from claiming that, from cost alone, it can only be determined whether charges are in and of themselves reasonable.

Measure of reasonableness by cost of transportation.

A better test, it is sometimes said, may be found in the value of the service to the owner of the property carried. Some articles must be carried at low rates, because the traffic will bear no higher, and therefore the low rates are all the service is worth. Other articles, though it may cost no more to carry them, may justly be charged much higher rates. The effect of transportation upon market value is taken into account by carriers in making rates, and it is insisted on their behalf that this is neither unreasonable nor unjust ; but it is very obvious that, if rates as to their reasonableness are to be measured by the standard of what the service is worth to the owner of the property, it is impossible, when considering the value of the service in transporting a particular kind of property by one method, to leave out of view the charges imposed for transporting the like property by another method, which for any reason is limited to a part only of the carrier's customers. Whether the service to the owner in carrying by one method shall be worth much, or be of no value whatever, may depend altogether on the charges which are made to others for carrying by the other method.

Value of service to owner as test.

But the proposition that we may determine absolutely what rates are in and of themselves reasonable on a consideration exclusively of the particular traffic by itself, is antagonistic to the whole railroad practice of the country, and would not for a

moment be accepted and acted upon by any committee of rate-makers. Rates are never made in that way ; but instead thereof

**Determination
of reason-
ableness of
rates on con-
sideration of
particular
traffic.**

property is classified, and the whole field is surveyed with a view to the establishment of such charges as shall be relatively proper and just, as near as circumstances will admit of their being made so. There is not a railroad company in the country with a business of any considerable magnitude that could justify each of its rates by itself, without taking its general traffic

into account, or without its being allowed to show how excessive competition at one point or in one traffic had forced higher rates elsewhere than might otherwise be reasonable, or how, on the other hand, good returns from one traffic which the traffic can bear without being oppressed, permit of very low rates to some other traffic which otherwise might be unprofitable. Thus the

**How reasonable
rates are de-
termined.**

railroad practice appears to be to treat those rates as reasonable in and of themselves which, on a consideration of the whole field of operations, it is seen that the carrier can afford to accept, and which at the same time the owner of the property can afford to pay, because they are not in excess of what the service is worth to him ; but in fixing upon rates, it is specially important, if not absolutely necessary, to have something like uniformity in the rates upon articles which are of like kind and value, and which supply the same demand, since otherwise those which are made to bear the heavier rate would be driven out of the market.

This being the method whereby reasonable rates are customarily determined, we have no occasion to discuss the soundness

**No occasion to
discuss position
that if rate is
reasonable it
cannot be
changed.**

of the position taken by counsel, that if a rate is reasonable in and of itself, the Commission cannot require it to be changed. We do not question the proposition of counsel that Congress has not conferred upon the Commission the authority to force a change of reasonable rates. By the Act to regulate

commerce, the Federal Legislature intended to be just to the carriers, as well as to do justice to the general public ; and we agree that it has not authorized their rates to be changed against their will when in themselves the rates are just and reasonable. If, therefore, it shall be found that the charges made by these defendants for the transportation of oil in barrels are in themselves just and reasonable, no order will be made by this Commission for their alteration ; but in determining their reasonableness we shall consider ourselves not only at liberty, but absolutely required, to keep in view the disparity which is shown to exist between them and the rates which the same companies charge upon the same article of merchandise when they receive and transport it

in cars furnished by shippers themselves. That disparity has an inevitable and very important bearing upon the question of reasonableness ; *prima facie* it is unjust, because it is oppressive, and the defendants are fairly called upon to exhibit good reasons for it.

This view of the case also renders it unnecessary for us, in considering the evidence adduced in support of the complaints, to distinguish as between that which is offered to prove excessive rates on barrel shipments and that which is given to show unjust discrimination. Whatever evidence tends to show that the rates on barrel shipments are unreasonable because too greatly in excess of the charges made on tank shipments, will also in like degree tend to show that in making rates on barrel and tank shipments respectively, the defendants were guilty of unjust discrimination. This is self-evident.

Consideration
of evidence.
Unnecessary
questions.

On the hearing, the defendants entered upon a justification of their rates, and it was planted by them on several distinct grounds. These we may summarize as follows :—

Grounds on
which defend-
ants justify
rates.

1. Those who have their property sent in tanks furnish the rolling-stock for the purpose, and save the carriers the necessity and the expense of supplying it.

2. This method of transportation exposes the carrier to less risks of losses by fire and of damage to other property transported by it.

3. It is more profitable to the carrier, because the probability of a return load is greater, and also because the load of a car may be greater, and the carrier neither loads nor unloads the property, nor furnishes storeroom for it.

Each of these grounds of justification deserves and must receive some attention at our hands.

1. The fact that the owner supplies the rolling-stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (*Railroad Co. v. Pratt*, 22 Wall. 123, 133), and then to offer their use to everybody impartially. If the varieties of traffic are such, and their requirements of rolling-stock so numerous and diversified, that this becomes impracticable or burdensome, so that the aid of their customers becomes essential or convenient, the supply obtained by their assistance cannot with any justice be utilized by the carrier in such manner as to establish discriminations which would otherwise be inadmissible. The carrier has no right to

Fact that
owner supplies
rolling-stock in
which oil is
shipped enti-
tled to little
weight.

hire rolling-stock and then allow it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling-stock in a competitive traffic. This, however, is precisely what takes place in this traffic if the rates for the transportation in barrels are considerably in excess of those which are charged for the transportation in tanks. The tank-cars which are furnished to the carrier by shippers, whether the use is paid for or not, ought properly to be held for the use of all; but if this is found impracticable, it is very certain and very obvious that proprietorship of the car for the use of which the carrier pays, as it generally does, can fairly entitle the owner to no special consideration in the making of rates. He has an advantage, arising from his ownership, in being able to control the use; but that circumstance can be no reason for extending to him exceptional consideration which will make the advantage specially oppressive to competitors. It is, on the other hand, a very forcible reason why the carrier should see to it that its patrons who are forced to make use of such facilities as it provides for them shall not find its own want of proper rolling-stock made a ground of discrimination against them. On this point the misapprehension of the situation is very apparent in some of the arguments which have been made for the defence. The complainant, it is said, asks the railroad companies to relieve him from the consequences of his own lack of capital to carry on his business to the best advantage. He cannot choose the best method, because that method requires a large outlay in capital. His competitor in business can choose it, and it is for that reason that complainant is driven out of the market. He must blame his want of capital, it is said, and not the railroad companies, for his failure.

A statement of the situation differing a little from this will more nearly present the actual facts. The railroad company not having supplied itself with the necessary rolling-stock to enable one branch of its traffic to be carried on in the way most advantageous to those who engage in it, suffers parties who have the capital which will enable them to supply the defect to put cars of their own upon the road, for the use of which it pays, and at the same time gives to such parties the exclusive use of what they supply, and also such preferential rates on the merchandise carried for them as will put successful competition quite out of the question. It is not the lack of capital to carry on the business that then proves fatal, but it is the lack of capital, in addition to what is needed in the business, to supply rolling-stock to the railroad company for his use. It would be the height of injustice for the carrier to make such a lack a ground

for discrimination in rates, and then to say that the party suffering from it had no reason for complaint, since the rates which are named are offered to all. The offer is exclusive in fact, whatever it may be in terms or on theory.

If a carrier of passengers were to make a uniform rate of three cents a mile to all who rode in the cars it provided, but, being deficient in rolling-stock, were to allow owners of private cars to fill them with passengers at two cents a mile, and be paid for the use of the cars in addition, we should not expect any one to attempt a defence of the discrimination based upon the ground that the rates were equally open to all, and that if one, by reason of lack of capital to supply himself with a private car, was unable to take the benefit of the most favorable rate, he should blame his fortune for it, not the common carrier. The wrong in such a case would be as plain as it would be gross; but such a discrimination in the carriage of persons would be far less injurious than a similar discrimination in the transportation of property: the one would involve a small sum of money only, the other might be destructive to a business. We hold, therefore, that the fact that one consignor furnishes a car for hire to the railroad company for the transportation of his oil, is no ground whatever for a discrimination in rates in his favor against another consignor who must ship in the cars the carrier supplies. It may be a reason for limiting to himself the use of the car he furnishes, but the discrimination cannot justly or lawfully go any farther.

2. The fact that transportation in barrels exposes the carrier to more risks than does transportation in tanks, seems to be most relied upon to support the discrimination made in rates, and it was very strongly urged on the argument. The risks are, *first*, of accidental fires in consequence of leakage from barrels; and *second*, of injury to other property arising from its being affected by petroleum odors. Considerable evidence was given to show that leakage from barrels was constant, and in warm weather very great, and that trains and warehouses were specially exposed to accidental fires in consequence. On the other hand, there was evidence that the risks are greatest when the oil is transported in tanks; the greatest risks being from collisions, which might break up and empty the tanks, and expose the whole vicinity, while barrels might for the most part or altogether escape breakage. Persons entitled to speak as experts differed very widely in their testimony on this point; but Mr. Brundred, the manager of the tank-line which is operated on the Pennsylvania roads, and who testified to having kept careful statistics covering a considerable period of time, showed by these that the risks from either mode of transportation were small, but were

Fact that transportation in barrels exposes carrier to greater risk.

least when the transportation was in barrels. Possibly his experience may have been somewhat exceptional; but we are not satisfied from the evidence that there is any such greater risk from fires when the oil is conveyed in barrels as can justify a difference in rates. The risk from injury to other property is something, but not serious. Oil in barrels is transported in cars which when not used for that purpose are employed in the transportation of live-stock, lumber, iron ore, or other articles not subject to injury from the odors, and when taken in car-load lots is loaded and unloaded by the shipper elsewhere than in the company's warehouses. With proper care, therefore, injury to other property ought very seldom to happen.

3. The greater probability of finding return loads for the tanks is much relied on. The return loads are either turpentine or cotton-seed oil. The turpentine region is reached by some of the roads, but not by all; but on those same roads are lumber, iron, and other heavy articles to be transported in the direction opposite to that in which the oil is taken, and which would constitute very suitable loading for the cars in which oil in barrels is carried southward. It is a very pregnant fact, as bearing on relative rates in this region, that Mr. Virgil Powers, the commissioner of the Southern Railway & Steamship Association, and Mr. Charles A. Sindall, the secretary, both of whom have had long experience in those or similar capacities, agree in opinion that oil in barrels ought to be transported as cheaply as the same quantity in tanks. This opinion would not have been given without good reason, and without doubt the probability of return loads for the tanks was taken into account. In the South-west cotton-seed-oil mills may or may not be found at the points to which oil in tanks is taken. If they are not, the tank must return empty, or it must be sent elsewhere for a load. But we do not learn from any evidence given before us that the railroad company has any right, under its implied contract for the transportation of the petroleum oil, to send the tank-cars to any other point for a load when it does not find one at the place of delivery. If there is any such right, it must arise from some special contract or arrangement; and if any such exists, the terms and particular privileges given are not disclosed in these cases; but when thus sent elsewhere, it may or may not be the case that there is any considerable advantage in it, such as would be derived from taking up a load at the point of delivery of the petroleum oil, and putting it down where the oil was received. The advantage in the latter case would be very great: in the former it might be trifling; but in all cases where cotton-seed oil is the return loading, the advantage would seem to be reduced to a

Greater probability of finding return loads.

minimum by the very low charge which is made for the transportation of that commodity. This charge, for some reason not satisfactorily explained to the Commission, is made astonishingly low when compared with the charge made upon petroleum, although the cotton-seed oil is much the more valuable article. It is very manifest from the evidence that the cotton-seed oil traffic in itself is not one of much profit to these defendants.

The capacity of some of the tank-cars is such that a larger quantity of oil can be taken by them than in such cars as barrels are conveyed in. This, of course, is favorable to the carrier, and enables him to carry more cheaply in proportion to quantity; but a considerable proportion of the tanks are not of this great size, and the load they carry does not exceed the ordinary car-load in barrels. Moreover, it has been shown that heretofore the great size of some of the tanks has been ignored by some of these defendants altogether, and they have made no distinction in charge between carrying sixty barrels in a tank and carrying twice that quantity. They may, therefore, be gainers instead of losers by the establishment of a rule which measures their compensation for the service rendered by the tonnage carried, whether it be in the one mode or in the other.

We are entirely satisfied that this ought to be the rule. Barrel shipments in car-load lots, loaded by the consignor, and to be unloaded by the consignee elsewhere than in the carrier's warehouse, if subjected to higher rates would be charged more than is either just or reasonable. We also think, and so find, that the great difference in rates shown in these cases to have been generally made as between barrel and tank shipments amounted to unjust discrimination as against the former. The rule should be to consider the tank a part of the car itself, and for the load carried in it the charge ought to be the same by the hundred pounds as is made on the transportation of barrels of oil in car-load lots in other cars. Even then the shipper in barrels is at some disadvantage, for he must pay freight on barrels as well as on oil; but this, as between him and the carrier, is not unjust.

We find, then, on a careful review of the testimony in this case, and after full reflection, that no sufficient reason is shown to justify the defendants making a distinction in their charges as between the parties employing the two different modes of carriage. We hold that when transportation is in car-load lots, the same charge by the hundred pounds should be made upon all consignments from and to the same points. Particular routes might be named on which it would be just to allow the oil to be carried in tanks at a lower rate, but on other routes the transportation

No sufficient
reason to justify making
distinction.

in barrels might be most likely to insure return loads. There neither is nor can be any rule on that subject; and the attempt to consider each road of a system and each several feeder by itself, and to discriminate for each according to the probabilities of return loads, would be far more perplexing than useful, and would breed many vexatious controversies. The roads constituting the Southern Railway & Steamship Association submitted the subject to three arbitrators in 1886; and the arbitrators, by an award made Oct. 27, 1886, decided as follows:—

“The board decides and awards, that, taking effect Nov. 1, 1886, coal oil in barrels, in car-load quantities, be put in sixth class released, the same as coal oil in tank-cars.”

By this award both methods of transportation were to be put, in respect to rates, on the same footing for the whole system; the arbitrators apparently deeming it impracticable to make any difference from a consideration of the probabilities of return loads. We assent to this view, because we think the attempt to take these probabilities into account would not be likely to have beneficial results.

This ruling concerns a traffic in which one method of transportation has no other or different effect upon the value of the article carried than has the other. The oil when delivered is of no higher value because of having been conveyed in barrels, and the owner has in no respect been supplied with superior accommodations or facilities which can be made the basis for an additional charge against him. The additional charge heretofore made has necessarily been grounded on something besides additional benefit to the party subjected to it.

This ruling does not preclude such allowance for the use of tank-cars as is customary, provided it be reasonable; but, on the contrary, it assumes that such allowance will be made. But it should be made on some system, by some rule of uniformity; and the authority to make it must not, carelessly or otherwise, be made a means of discrimination.

It is now to be considered how far these parties, severally, are to be deemed guilty of unlawful discrimination in what they have done during the period covered by the complaint.

Question of
unlawful dis-
crimination
by parties,
severally.

Upon this subject we have to say at the outset, that, in our opinion, the mere fact that they have hitherto made a difference in rates as between the shipments in barrel and the shipments in tanks ought not of itself to be considered proof of unjust discrimination. There is room for great differences in opinion as to the relative rates which can justly and properly be charged, and a considerable difference might honestly be made

Difference in
rates in barrel
and tank ship-
ments not
proof in itself.

in framing a rate-sheet. There should be further proof than this mere difference to make out the unlawful discrimination as regards consignments made prior to the time of promulgating this opinion.

In the case of the Louisville & Nashville Railroad Company this additional proof is furnished in several ways.

One of the proofs is to be found in the making of the rate by the tank-car, regardless of weight or quantity. When one tank holds twice as much as another, there can be no valid excuse for this: it necessarily makes the rates excessively low to the shipper in large tanks, and specially oppressive to the shipper in barrels, when the largest tanks are made use of. But the wrong was emphasized in the case of this company by the public being led to suppose that when the contents of the car exceeded a certain quantity or weight, an extra charge was made, when in fact this was never done. But proofs of intentional disregard of the rights of the complainant, or of such want of regard for them as is equivalent, are made very evident in the correspondence between himself and the agents of the company.

Additional
proof to show
discrimination
in case of Louis-
ville & N. B. Co.

The general freight agent of the company testified that its freight rates on oil in tanks up to April 5, 1887, were made regardless of quantity; that they were then changed to rates by the hundred pounds, but on the 11th of May following, the company again went back to tank-car rates, irrespective of quantity. Fixing the rates in tank-cars by the hundred pounds does not seem, however, to have meant much, for there were some shipments within this period by the Standard Oil Company regardless of actual weight; and the witness testified that a tank would have been received as holding twenty thousand pounds, though this was greatly below the average quantity carried in one. He testified further that the Southern Railway & Steamship classification as printed and as given out by his company has this note: "Coal oil or its products in tank-cars must always be charged at actual weight;" but, though a member of that association, his company made only the tank-car rate, regardless of weight. That rate was printed on a typewriter, and posted in its offices. The association has inspectors to report any underweighing; and if a tank was billed at twenty thousand pounds, and on weighing they found it to be more, they should report the fact, the witness said; but the report, so far as we can discover, would perform no valuable function whatever. The posting of a rate in the company's office was supposed by the witness to show sufficiently that the company did not accept the rule of the association as to actual weights. In this he was in error. The public would have a right to understand that his rate-sheet and the note in

the classification were to be construed together, and effect given to both thus construed.

The correspondence between this witness and the complainant will best show the discrimination, so far as it seems to have been personal.

May 16, 1887, the witness, in response to inquiries by the complainant, says the company has no tank-cars, and cannot furnish them. "Regarding charge for returning empty tank-cars, we first wish to know to what points shipments of oil in tank-cars would be made. Generally, however, I may say the rate returning would be one and a half cents a mile." "The rates on coal oil, car-load, from Louisville to Huntsville, Ala., are, in barrels, 37 cents per hundred pounds." This statement of the Huntsville rate was conceded to have been an error. The witness says the rate was 29½ cents, but was mistakenly given by a subordinate who wrote and signed the letter in his name.

May 18 complainant replied, complaining that the rates actually made by defendant had the effect of discrimination as between tank-car and barrel shipments to the extent of over 50 per cent in favor of the former, to the great injury of his business in favor of the Standard Oil Company, and adding, —

"Please state why it is that the rates by barrel and bulk are made the same to some points and 50 per cent difference to others, and how can you thus discriminate against me? Can't you give a lower rate than 37 cents per hundred pounds in barrels, Louisville to Huntsville, Ala., and are you not letting other shippers ship their oil at a less rate?"

"What I desire to know is, if you are willing to pro-rate on an equitable basis with the Cincinnati, Washington, & Baltimore on my oil shipments from this point. Please answer promptly, and oblige."

May 21 the witness answers, —

"The rate to Huntsville and to other points which we have quoted are as low as we are at present prepared to name."

Here the witness adopts, and in effect repeats, what he says was a mistake in his subordinate, after his attention had been specifically called to the figures. Complainant was thus notified that the rate to him would be 37 cents, though others were charged 29½ cents only. In fact, there seem to have been shipments by the Standard Oil Company of Kentucky at 27½ cents, but this charge was possibly an inadvertence. The answer proceeds to justify the difference in rates as between tank and barrel shipments, and then goes on to say, —

"I do not see that it is any of your business whether we pro-rate with the Cincinnati, Hamilton, & Dayton, or Cincinnati, Washington, & Baltimore roads or not. You can doubtless

obtain through rates from them, and the matter of division of revenue between those companies and our roads is a matter that concerns only our respective lines, and not you."

Here was a third mistake. It was undoubtedly the business of the complainant to ascertain, if he could, whether this company would pro-rate on an equitable basis with any other road over which he desired to ship his oil, and in that way obtain through rates. Nothing in the case shows that through-rates were then in existence, unless it be the statement in this letter that through-rates could doubtless be obtained of the other roads; but if there were such rates, there was nothing out of the way in complainant endeavoring to procure a modification, and his inquiry on the subject was not wanting in either civility or propriety.

Further, the letter proceeded to say, —

"In conclusion, let me repeat that the rates furnished you are just as low as furnished anybody else; that whatever rates may be furnished by the Louisville & Nashville road apply to all shippers, and that all communications from you asking for rates of freight, or appertaining directly to your shipments over our line, will meet with respectful consideration and attention; but I have neither the desire nor the time to give attention to your letters asking for the reasons governing the policy of the Louisville & Nashville Railroad Company, criticising its rates, or suggesting basis for dividing rates between its connections and its own line, and I shall not reply to any such communications in the future."

This lacks accuracy, for the Huntsville rate was still 37 cents to complainant and 29½ cents to other persons; and it overlooks altogether the fact that "the policy" of the company, so far as it affected his shipments, was complainant's concern, as well as the concern of the company, and he was entirely within the bounds of what pertained to his business, as well as of right, in endeavoring to bring about a change.

May 17, in answer to an inquiry from the office of the witness, complainant was given a rate of \$1.30 on oil in car-load lots, Cincinnati to Nashville. This is also conceded to be an error and an excess over the rate then charged to others; but the error was not corrected, as it should have been, in the subsequent correspondence.

Aug. 29 complaint wrote the witness as follows: —

"Please name rate on coal oil in barrels and tank-cars, Louisville to Nashville, and advise what rate per tank-car you allow; also rate to Columbia, Tenn., car-load, and what classification do you now use." On the next day he wrote again: "Please name rate on tank-cars, Louisville to Montgomery, Ala.," etc.

Sept. 2, instead of answering these letters, the witness writes to ascertain by what line or lines the shipments would be forwarded from Marietta; a fact which could have no bearing on the inquiry made of him. His company was supposed to have regular and stated rates on its own lines, and he was asked to give them. He should have given them with the same promptness when the oil was to be delivered to him over another road that would be expected from him when the traffic originated at Louisville.

On the hearing the witness was asked whether he had not refused to give complainant rates on barrels to Knoxville and Nashville, and he replied, —

“No, sir; not that I know of. I will add that I know of no reason why we should refuse him rates to Knoxville and Nashville, and I would say that we have not.”

It nevertheless appeared that the witness, on being pressed by complainant to give rates on defendant's line, referred him to Mr. Fraser, of the Cincinnati, Washington, & Baltimore roads, for through-rates. He was told, in reply, that Mr. Fraser refused to give rates, but he still continued to refer complainant back to him. The witness was asked by a member of the Commission, —

“What objection could you have, no matter over what roads the oil came to Louisville, to name rates from Louisville to Nashville?”

“*Answer.* Nothing, except that I thought he ought to get rates from the lines he dealt with. They had our rates.”

The question in substance was repeated for further answer.

“*Answer.* Well, if Mr. Rice was prepared to or had delivered his oil directly, there would have been no objection. We would, of course, have been willing to name him tariff rates; but he was away from our line, and we preferred to let him get the rates through our connections. We felt that if we furnished him a rate, and that rate was advanced, and we did not give him any special notice of the change, and he went along doing business basing his price on the rate that had formerly been quoted him, that he would hold us for the overcharge.

“*Question.* Was that the reason, — so that you might be in position to advance the rates without notice?”

“*Answer.* Without special notice to him; that was the main reason. There was another reason that also influenced me in not giving him rates. I found that Mr. Rice had been asking the Cincinnati office for part of the rates, and our office for part of the rates; and while the rates in our office and in the Cincinnati office are supposed to be the same, still, if he got the rates partly from my office and partly from the Cincinnati office, we

would not know to what points they had quoted him rates, and the Cincinnati office would not know to what points we had quoted him rates."

"*Question.* What was the objection to his being quoted rates from any other office, if they were the same?"

"*Answer.* If he got the rates from our office, and he had to be notified by special letter in case of an advance in those rates, I would not know if the Cincinnati office had quoted him any rates, and would not be able to notify him of the advance in the rates quoted by the Cincinnati office. If he had to be notified by the Cincinnati office of an advance in rates, they would not know that we had quoted him any rates. I was clearly of the opinion, and still think, that the proper place for him to get his rates was from the line that took his business in the first instance. With the number of people writing constantly for rates, the giving special notice to shippers of changes is very liable to be overlooked."

It will be noted that this testimony comes from the officer who would be expected under the law to have the rates on his own lines printed and posted in the offices of the company, and open to public examination. If the rates were thus printed and posted, much of the correspondence would seem to have been needless; and the inference is very strong that the law, in its spirit at least, was not observed. The injurious consequences resulting therefrom were not relieved by answers to complainant's letters. He was not given the rates because, as we are told, the officer supposed if that were done, and the rates afterward changed, he would be under obligation to give him personal notice of the change. This hardly seems a plausible excuse. The law imposed upon defendant's officers no obligation to give special notice to shippers in case of lawful change of rates, and the giving-out of the tariff-sheets or the quoting of rates could no more create such an obligation than could the posting of the sheets at the company's stations, as the law required.

The witness was further asked whether he did not persist in his refusal to quote rates after he had been notified that Fraser declined to name them. He replied, "That is likely, but I do not think I am to be blamed for Mr. Fraser's action." This is quite true: he should not be blamed for Mr. Fraser's action. It was his own illegal refusal to act, that he was blamable for. Mr. Fraser was not compellable to name rates over any road but his own unless he joined in making them; but this witness' obligation to give the rates on his own road was plain and unquestionable.

The two following letters will close the quotations from the correspondence:—

From complainant to the witness, of date Sept. 19, 1887: "Your two letters of the 13th, and one each of the 14th and 17th, at hand. I have stated to you that Fraser, of the Cincinnati, Washington, & Baltimore, the initial road, refuses to give me through-rates by your road; and still, when I so repeat this to you several times, you persistently ignore what I say, and constantly refer me back again to him. This is now played out, and I now again ask you point blank, do you still refuse to give me the oil rates from Louisville, as asked for in my several previous letters? A further refusal to give me these rates, or to furnish them immediately, I shall consider an absolute denial to give them. Your rates from Louisville are lower, as stated by me, and same denied by you, as an instance will quote. Brent Arnold, your agent at Cincinnati, quotes \$1.30 per barrel, Cincinnati to Nashville; Marietta to Cincinnati, 32 cents per barrel, or \$1.62 total. The rate from here (Marietta) to Louisville is 50 cents per barrel, and Brent Arnold quotes 18½ cents per hundred pounds, Louisville to Nashville, this route via Louisville, thus saving me over 40 cents per barrel, provided you would so condescend to give me a rate from Louisville. This is a fine state of affairs. On Sept. 8 I asked you to forward me a copy of each of your tariff or rate sheets issued since April 1, and to put me on your exchange list, so that I would be notified promptly of any change in oil rates. This request you ignore and do not answer. By this means you would legally avoid all legal liability for any discriminations that could possibly arise, and where one is constantly asking for rates to ship on, this should be done, and save so much correspondence; but you doubtless think otherwise. I take it for granted, unless I hear to the contrary, that you refuse to give me oil rates from Louisville. You do not answer my question in my letter of the 10th. I am desirous and will build immediately twenty tank-cars to carry bulk oil over your system if you will guarantee or assure me that you will carry said oil in said tank-cars at as low a net rate as accorded any other shipper."

To this the answer, of date Sept. 27, was: "Your favor of the 19th instant was received during my absence, which has prevented an earlier acknowledgment of the receipt of it. I have nothing to add to my letters of Sept. 13, 14, and 17 upon this subject."

Complainant did not succeed in obtaining rates. The denial of his right was plain, and stands unexcused. Counsel for this defendant did not attempt on the argument either to show cause for it or explain it away. What reasons there may have been for it, we do not know; but we find that they were not just or legal reasons. We further find that defendant was guilty of unjust discrimination against complainant, as charged, and that the

Defendant
found guilty
of unjust
discrimina-
tion.

discrimination was in favor of the Standard Oil Company of Kentucky and all other parties sending oil by tank-cars. We further find that to the extent that rates on barrel shipments were erroneously given and persisted in, as in the case of rates to Huntsville and Nashville, defendant was guilty of unjust discrimination against complainant in favor of other parties sending their oil in barrels.

The case of the St. Louis, Iron Mountain, & Southern Railway Company is confused somewhat in the record, as it was in the correspondence, by the fact that the road was operated for the period in question by the Missouri Pacific Railway Company. Some extracts from the correspondence are here given.

Case of St.
Louis, I. M.
and S. R. Co.
Extracts from
correspond-
ence.

April 28, 1887, complainant writes the commercial agent of these roads at St. Louis, —

"Please give me the terms on which tank-cars, empty, are returned, as I see by your classification it is by special contract; also, do you make bulk oil by weight per barrel when shipped in tank-cars? If so, state the weight, and how many gallons in bulk you figure on to the barrel. Can I ship one or more tank-cars at same rate, or does the Waters-Pierce Oil Company or the Standard Oil Company have any preference as to number of cars shipped?"

May 2 he writes the assistant general freight agent, —

"Do you take tank-cars at 20,000 pounds, regardless of weight, as your special rate (No. 54 A) is ambiguous on this point? At what weight per barrel in barrels and in bulk do you carry coal oil? also what special rate do you charge on return of empty tank-cars when not furnished (or furnished by shipper)? Please name barrel and tank-car rates (car-loads), Palestine, Tex.; Santa Fe, N.M.; Leavenworth and Atchison, Kan., and Kansas City, Mo."

May 5 the commercial agent replies, —

"Changes adopted at recent meeting of Texas Traffic Association at Houston made coal oil in barrels or cases, Class A, in car-load lots, and in tank-cars, minimum weight 25,000 pounds, 50 cents per hundred pounds, St. Louis to Houston, Galveston, Jacksonville, Texarkana, and intermediate stations."

The points here named are on defendant's road.

May 9 the assistant general freight agent writes, —

"The weight of a tank-car contemplated under our special 50 A is 20,000 pounds. Shipments of oil in barrels to points governed by Western Classification are taken at estimated weight of 400 pounds per barrel; to points governed by Joint Texas Classification at actual weight.

"With reference to rate on return empty tank-cars, I beg

to advise that from Missouri-river points — i.e., Kansas City, Leavenworth, and St. Joseph — we return them free when the same have been hauled over our line. The same rule applies on tank-cars from Texas, with the understanding that no mileage is to be paid or allowed by the railroad companies.

“The rate on coal oil in tank-cars, East St. Louis to Santa Fe, is \$1.65 per hundred pounds actual weight; to Leavenworth, Atchison, and Kansas City, 25 cents per hundred pounds actual weight. The rate on coal oil tank-cars, East St. Louis to Palestine, is 50 cents per hundred pounds, minimum weight 25,000 pounds.”

This last rate is corrected to 45 cents by letter dated the next day. These letters of May 5 and May 9 are both written under the heading of Missouri Pacific Railway Company.

May 10 the commercial agent writes, —

“In looking over our correspondence, we note the concluding portion of your letter, which asks if Waters-Pierce Oil Company have any preference as to number of cars shipped? We answer, No, sir: you are exactly on the same level as any other oil-shipper over our line. We carry all shipments at actual weight, and make the usual mileage charge on return of empty tanks.”

This last statement was not warranted by the facts; defendant made an allowance to the owner of the car of three-fourths of a cent per mile for the use of the car.

May 11 complainant writes the assistant general freight agent, —

“Do I understand that tank-cars of bulk oil are taken at 20,000 pounds each? Also that 200 cases (or 60 barrels) are taken also at 20,000 pounds (per special rate No. 52 A)?”

May 16 complainant writes the commercial agent, —

“Do you charge extra for return of empty tank-cars; if so, how much?”

The special rate, 52 A, above referred to, was put in evidence. It purports to be issued by the Missouri Pacific Railway Company, and gives rates “on illuminating and lubricating oils in car-loads of 300 cases, or 60 barrels, or per tank-car of 20,000 pounds, from St. Louis, Mo., to Vinitia, I. T., \$65; McAlistier and Muscogee, I. T., \$110.” These points are not on defendant’s road.

Also special rate 53 A, issued by the Missouri Pacific Railway Company, and taking effect at the same time, as follows: “Coal oil, car-loads, from St. Louis and Carondelet, Mo., to Newport, Ark., \$50 per car of 55 barrels, or per tank-car; Little Rock, Ark., \$50 per car of 55 barrels, or per tank-car; Texarkana, Ark., 45 cents per hundred pounds.” The rates per tank-car by this last would apparently be irrespective of actual weight.

May 19 the assistant general freight agent writes complainant, —

"Replying to your communication of the 11th, I beg to advise that the rates mentioned in our Special No. 52 on illuminating and lubricating oils are per tank-car of 20,000 pounds; that the excess over the number of cases or barrels mentioned loaded in box cars, or the excess over 20,000 pounds contained in a tank-car will be taken at a proportionate rate per hundred pounds. In this connection I beg to advise you that our rate on oil in tank-cars to McAlister and Muscogee is 50 cents per hundred pounds. In other words, we do not exceed to McAlister or Muscogee the rate which is made to Denison, 50 cents per hundred pounds when in tank-cars."

May 21 complainant writes the assistant general freight agent, —

"Do you actually in each and every instance weigh tank-cars of oil as shipped out, as well as the empty tank-cars on their return, and charge full net weight thereon as thus shown, or do you estimate them, or how do you do this? Please answer promptly and to the point, and oblige."

May 26 an answer to other portions of this letter ignores the above query altogether.

Several other letters passed between the parties relating specially to the discrimination made by the published tariffs between the shipments in barrels and cans and by tank-cars.

Sept. 8 complainant writes the assistant general freight agent, —

"Please inform me if you are still taking tank-car oil at an estimated weight per car, or do you actually weigh each and every car, or do you take the estimate given you by the consignor? Will you give me the same net rates and weight by tank-car to Austin, Dallas, Palestine, Houston, and Galveston, that you now give the Waters-Pierce Oil Company, or as low net rates as is given any shipper over your various lines, and please name me those rates to above points."

This was answered as follows: —

"The charge on oil loaded on tank-cars is on a basis of actual weight, minimum weight 25,000, at the established rates which are open to any shipper. This also answers your letter of the 8th to Mr. O'Connor."

The minimum car rate is stated in the evidence to have been raised on defendant's road to 25,000 pounds in July.

Sept. 23 complainant writes the assistant general freight agent, —

"You refer to my two letters of the 8th, but fail to answer the most important part of those letters, which I repeat once

more, in order that you may clear up the obscurity of your vision. I am desirous and will build twenty tank-cars to carry bulk oil over your system of roads, provided you will assure or guarantee to me the same net rates that you allow the Waters-Pierce Oil Company, or as low a net rate in tank-cars as is accorded to any other shipper to such general points as Austin, Dallas, Palestine, Houston, Galveston, and other points reached by your vast system."

Sept. 27 reply was made: "The rates charged by this company are open and alike to all shippers."

Sept. 30 the complainant writes the assistant general freight agent, —

"Please inform me of the largest size or the largest capacity of tank-cars you will carry over your lines, and the largest capacity now used, and have you any particular requirements how they shall be built in order to conform to your general rules?

Will you state to me more definitely and assure or guarantee me, in case I build tank-cars, that you will give me as low net rates per car or per hundred pounds that you will give to the most favored shipper that ships in that manner over your lines, regardless of the quantity shipped? This assurance and guaranty I desire before I put my money into it, — that I shall be treated exactly alike, and have as low net rates in all other respects (regardless of commissions, etc.) that is accorded any other shipper, large or small. I am now in correspondence with tank-car builders on this subject, and desire an early answer."

Oct. 4 this was answered, —

"We have no regulations governing the weight carried in tank-cars different from the customary rules between Western roads as to the weight carried in ordinary cars, nor do we require these cars to be constructed on any special plans or dimensions. You are probably as familiar as our people with the kind of tanks customarily used. As to your request for further guaranty that you will be treated alike in the matter of rates, we can only refer to our previous letters on this subject, and to the laws under which our company operates as a common carrier."

It cannot be denied, we think, that complainant, from this correspondence, must have had some difficulty in determining for himself what he would be charged on shipments in

Effect of correspondence.

tank-cars. The statements are different, as they relate to different points on the roads in charge of the parties making them, and the limitation of 20,000 and 25,000, and the reference to actual weight, are so presented as to be confusing, to say the least. On May 5 complainant is given a rate to Texarkana by the tank-car, 25,000 minimum weight, but the actual rate appears by special sheet, 53 A, to have been 45

cents per hundred pounds, irrespective of quantity; and the evidence, we think, strongly tends to show that the shipments to Texarkana were actually made up to July 11, regardless of quantity.

Whether the weight carried was ascertained by actually weighing the cars loaded and empty, complainant was not told, though obviously it was important that he should know. His persistent queries elicited no response. The evidence tends to show, however, that with the exception of a few shipments made early in the year, the actual weight was paid on; but certainly complainant was not to be blamed for being pressing and persistent in his inquiries when the published rate-sheets were so far wanting in clearness and certainty. Had all the facts been known to him precisely as they are brought out by the evidence, it is not unlikely that this complaint would have been limited to the discrimination between the barrel and tank rates as shown by the published tariffs. We do not find evidence in the case that the officers of the road have made use of any devices to give further differences than those which the rate-sheets show, and the tanks which were taken at uniform rates did not differ widely in size, as was the case on other roads.

It is apparent from the correspondence, that, as regards the tank-cars furnished, and the return of them by the company after the oil has been delivered, this company was, and perhaps still is, without any definite rule. It is impossible to doubt from the correspondence that the officers would have felt at liberty to make a charge to complainant for returning his cars, if he had shipped over their lines. It is not claimed, as we understand it, that the Waters-Pierce Company was so charged at the time the letters on that subject were written.

On the whole, we find that neither the published tariffs nor the correspondence gave to the complainant the information he was fairly entitled to; that the effect was to repel his attempts to engage in shipping in tank-cars in competition with the Waters-Pierce Oil Company, if, in fact, his purpose was in good faith to enter into the competition.

**Finding, as to
St. Louis, I. M.
& S. B. Co.**

On behalf of the Cincinnati, New Orleans, & Texas Pacific and the Alabama Great Southern Railroad Companies a legal argument has been filed, the purpose of which is to demonstrate that the transportation of oil in barrels is so far a different traffic from the transportation of the same article in tanks, by reason of the different circumstances and conditions, that the charges made upon the one cannot be the proper measure of the charges to be made upon the other. In support of the general

**Case of Cincinnati, N. O. & T.
and Alabama
G. S. B. Cos.
Legal argument
filed.**

position thus taken, quotations are made from *Great Western R. Co. v. Sutton*, 4 Eng. & Ir. App. 239; *Lotspeich v. Central Railroad of Georgia*, 73 Ala. 406; s. c., 18 Am. & Eng. R. R. Cas. 490; *Chicago, etc., R. R. Co. v. People*, 67 Ill. 24; *Girardot v. Midland R. Co.*, 4 Railw. & Can. Traf. Cos. 291; *Nicholson v. Great Western R. Co.*, 5 C. B. (N. S.) 636; and as to reasonableness of charges, *Denby Main Colliery Co. v. Manchester, etc., R. Co.*, 11 App. Cas. 97; s. c., 26 Am. & Eng. R. R. Cas. 97; *Smith v. Pittsburgh, etc., R. R. Co.*, 23 Ohio St. 10; and *Evans v. Oregon, R. & T. Co.*, 1 Interstate Commerce Reports, 336, are relied on. These are instructive cases.

On this general subject we have already said all that we think necessary at this time. The traffic, in whichever method conducted, is one traffic. The two methods are different, but the chief difference is found in the fact that for the one the defendants furnish the rolling-stock, and for the other they do not; but this difference cannot, on any grounds of equity or justice, entitle them to discriminate in their charges as against the method which is conducted according to the usual mode, and by accepting the facilities they offer. The conditions are such that justice cannot be done to those who send their merchandise according to the customary mode, except by protecting them against the relatively lower rates which are given to those who adopt the other mode.

On the question of discrimination against the complainant, the correspondence with the general freight agent of these roads will be instructive.

**Discrimina-
tion. Corre-
spondence with
general freight
agent.**

April 9, and again on the 12th, complainant wrote the general manager of the first-named road for rates. On the 16th the general freight agent replied as follows: "The present rate on oil in barrels, carloads, and also in tanks, from Cincinnati to New Orleans, is 34 cents; Birmingham, 47 cents; Meridian, 58 cents; Vicksburg, 54 cents; Knoxville, 24.4 cents; Chattanooga, 24.4 cents; Atlanta, 46 cents; Montgomery, 47 cents; Jackson, Miss., 61 cents; Mobile, 34 cents; Selma, 47 cents; Shreveport, 74 cents, per cwt."

April 18 complainant again wrote, "Rates from Cincinnati received. The Standard are selling oil in Birmingham, Ala., at prices which indicate a lower rate than you quote. I therefore desire to know if your rates from Ludlow or any other points on your lines are lower than rates named me from Cincinnati. Please advise, and oblige."

This does seem to have been answered, and the inquiry was renewed, and elicited a response on the 28th, as follows:—

"Rates on coal oil. I beg leave to inform you that the rate

on coal oil in barrels, car-load lots, Cincinnati to Birmingham, is 47 cents per hundred pounds.

"We have renewed rates to all points south of the Ohio and east of the Mississippi River, as published March 31. This basis will continue in existence until the Interstate Commission have definitely determined the question of the long-and-short-haul clause. You are, of course, aware that the Steam Railway & Steamship classification makes coal oil, car-loads, sixth class."

The noticeable thing about this letter is, that it refers to the classification of the Southern Railway & Steamship Association with an evident purpose to have complainant understand that this complainant recognized and accepted it. The proof shows that such was not the fact. Defendant, though it accepted it in part, and circulated it with its rate-sheets, repudiated it so far as concerned this traffic and some others, and its rates were materially different from what they should have been, had that classification governed them. The repudiation of it, however, was only notified to the public by the making of special rate-sheets which were not in conformity to it, — obviously a very imperfect mode of giving the information.

April 28 complainant writes, —

"Please state if oil in tank-cars and barrels is under same classification, and also what rate per barrel you ask on barrelled oil, also in bulk, per tank-car, and how many gallons you allow to a barrel in bulk per tank-car."

May 4 the general freight agent replies, —

"As stated in my last communication, the classification of coal oil in barrels in car-load lots is sixth class. I regret that I am not yet in position to quote through-rates on coal oil in tank-cars to all points reached by connecting lines, not having yet received the necessary information from them.

"I am not able to answer your inquiry as to how many gallons will be allowed to the barrel, but beg to assure you that every consignment will be waybilled upon an actual weight basis."

Here is repeated the erroneous information about the classification.

May 4 complainant writes, —

"Do you take tank-cars of oil at actual weight; that is to say, do you weigh each and every car? At what rate per barrel do you now take barrelled oil; also bulk oil per barrel, and how many gallons of bulk oil do you allow to a barrel; also what charges for return of empty tank-cars? In my letter of April 18 I asked you if you were now giving any lower rates to other parties from shipping points outside of Cincinnati on coal oil to the various points and places named to me per your letter of

April 18. To this question you have not as yet answered. I would be much obliged if you would answer promptly."

This was not answered promptly, and on May 7 complainant writes complaining of the neglect, and also of discrimination between shipments in barrels and in tanks, supposed to have been agreed upon at a meeting in Chicago.

May 9 the general freight agent replies, —

"Rates on coal oil. Referring to your two favors of the 4th and 7th instant, I regret that my frequent and enforced absences from Cincinnati have at times prevented as prompt replies being given to your communications as I would have wished.

"I beg to inform you that this company was not represented at any meeting held in Chicago on March 11, and also that upon all shipments of coal oil in barrels we propose charging upon an actual weight basis.

"As you are aware, the classification of the Southern Railway & Steamship Association makes the rate on coal oil in barrels, car-load lots, sixth class. You are also aware that by special authority of the National Railway Commissioners the lines of the Southern Railway & Steamship Association have renewed their former rates, and I take pleasure in forwarding to you by this mail a copy of our latest tariff from Cincinnati.

"I think it hardly necessary for me to say that above rates will be charged to all shippers alike."

Here the mistake about the classification is again repeated. The reference to the National Railway Commissioners — by which this Commission was intended — was misleading, to say the least. The Commission never investigated coal-oil rates, or gave "special authority" for their renewal; it never sanctioned any difference in the rates as between tank-car and barrel shipments, and had never, up to the date of this letter, had its attention called to them in any way. What it did was to relieve the carriers represented in the association temporarily from the strict rule of the fourth section of the Act to regulate commerce, with a restriction that in the mean time the disparities existing under their tariffs should not be increased.

May 11 complainant writes, and what he says regarding the classification of the Southern Railroad & Steamship Association is altogether natural under the circumstances: —

"Yes, I am aware that the classification of the Southern Railroad & Steamship Association makes rate on coal oil in barrels sixth class (same as tank-cars), but what does such issuance of a rate amount to when not lived up to by you and other lines? Mr. Gault wrote me and called my attention particularly to a printed circular issued by Virgil Powers, commissioner, dated Nov. 1, 1886, in which barrelled and tank-car oil is both

made sixth class. Your tariff sheet No. 11, dated November, 1886, just received, makes barrelled oil fifth class, and tank-car oil sixth class. How do you reconcile this? But this difference is trivial compared to other more gross outrages practised by your lines and others in carrying tank-car oil by the lump (regardless of weight) at about one-fourth of that charged on barrelled oil pound for pound.

"You say that upon all shipments of coal oil in barrels, we propose charging upon an actual weight basis. Does this apply to tank-car shipments of bulk oil; and, if so, do you actually and without a question weigh each and every tank-car of oil that goes over your line, and charge full weight thereon?"

"Please name me rates on oil in tank-cars and barrels to Lexington, Chattanooga, Atlanta, Birmingham, Jackson, Miss.; Meridian and Vicksburg, Miss.; Knoxville and Huntsville, Tenn.; Shreveport, La.; and Montgomery, Ala. I trust and hope that you will give me these rates promptly.

"Please state if any charge for return of empty tank-cars. Can you not pro-rate with the Cincinnati, Washington, & Baltimore, so as to give me through-rates from here to above points?"

The reply May 14 is as follows:—

"In my letter of the 28th ultimo, which you refer to, I advised you that we had renewed rates to all points south of the Ohio and east of the Mississippi River, the same as were in effect on March 31. I have already sent you copy of our tariff No. 11, which indicates rates now in effect, and which have been in effect from the time we received from the National Commissioners the exemption from the fourth clause of the Interstate Commerce Law. I note your request to be furnished with rates to Lexington, Chattanooga, Atlanta, Birmingham, Jackson, Meridian, Vicksburg, Knoxville, Huntsville, Shreveport, and Montgomery, and will endeavor to obtain the necessary information from connecting lines, and advise you further as early as possible.

"I regret that we cannot pro-rate with the Cincinnati, Washington, & Baltimore road, and our rates will consequently apply from Cincinnati."

The inquiry as to a charge for the return of the tank-cars, it will be seen, is not responded to.

May 16 complainant writes to get rates, and adds, —

"Please inform me why you cannot pro-rate with the Cincinnati, Washington, & Baltimore on the through-rate on the oil from here. You certainly must pro-rate with her on other business from other points, or from east and west."

The answer May 20 was, that "all shipments of coal oil pay our rates from Cincinnati, and we are not pro-rating on this traffic from any point whatever."

Some other letters near this time are omitted, as not being important to this controversy.

May 28 the general freight agent writes, —

“Referring to recent correspondence, and quoting rates to the points named in your letter of the 11th instant, I beg to inform you that the following rates on coal oil are obtainable from Cincinnati to the points named :—

	In car tanks.	Car-loads per 100 lbs. in barrels.
Lexington	\$26 00	13 cents.
Chattanooga	50 00	33 “
Atlanta	61 80	46 “
Birmingham	60 00	47 “
Meridian	60 00	45 “
Vicksburg	60 00	34 “
Knoxville	50 00	33 “
Huntsville	37c. per 100 lbs.	
Shreveport	118 00	64 “
Montgomery	112 00	47 “

As bearing upon this table, a list of shipments was given, some of the figures in which require notice. The rate — barrel rate — to Lexington was soon reduced to 10 cents per hundred pounds, the tank rate remaining the same. The average shipment in tank-cars to that point seems to have been of 31,223 pounds weight, which would make the rate on tank-car shipments about 8.32 per hundred pounds, and the barrel rate about 20 per cent higher. The only shipper to this point in either mode was the Standard Oil Company of Kentucky. In contrast to these the shipments from Cincinnati to Chattanooga were in tank-cars varying from 25,000 to 43,815 pounds. The barrel rate was 33 cents per hundred pounds. The tank rate was \$50 per car. At 33 cents per hundred pounds, the rate on the oil carried in the smallest car would have been \$82.50; on that carried in the largest it would have been \$144.50. On an average of the two it would have been \$113.54. The average makes the rate on barrel shipments 125 per cent in excess of the rate on tank shipments, instead of 20 per cent excess, as at Lexington.

A similar vast discrepancy was shown in the rates from Cincinnati to Meridian. The tank rate was \$60, which, if the tanks averaged 24,000, would make the rate per hundred pounds 25 cents; or if they averaged 30,000, 20 cents; but while this charge remained, the rate on barrel shipments was raised to 56 cents per hundred pounds, — probably not less than 175 per cent excess over the tank-car rate.

May 30 complainant sent the following letters :—

"Please name rate on oil, tank-cars and barrels, car lots, to Mobile and New Orleans."

Also —

"Yours 28th, enclosing rates, finally to hand, after several applications. These rates are prohibitory on my shipments, as you know full well, and the device or method of the tank-car shipment in bulk is purposely used against me (who ships entirely in barrels) in order that I cannot compete with the Standard Oil Company in the sale of my products.

"By these rates thus given me to nine prominent points in the South, you discriminate against my shipments not less than 67 per cent, and as high as 213 per cent; while to one — Huntsville, Ala. — you make the rate the same per hundred pounds for both barrelled oil and that in tank-cars. I will here show you how I arrive at this comparison: —

"All the bulk oil carried in tank-cars from the Pennsylvania oil regions to the seaboard pays the same amount for 50 gallons in bulk as for 50 gallons (including the barrel), or the empty barrel is carried extra to compensate for the return of the empty tank-car, and cannot bring back freight, as against a box car that can. I maintain and assert that the tank-cars of the Standard Oil Company hold at least 100 barrels of 50 gallons (or 5,000 gallons each) *on an average*, while some of them hold over 6,500 gallons (or 130 barrels); but for a fair and equitable basis I will call it 100 barrels, and herewith give you the results and the amount of discrimination you dare to impose on me in the face and eyes of the Interstate Act: —

From Cincinnati to —	Per car, tanks.	Per barrel.	Per 100 pounds in barrels of 400 pounds.	Per bbl.	Discrimination.
Lexington, Ky. . .	\$26 00 or	\$0 26	13c. or	\$0 52	100 per ct.
Chattanooga, Tenn. .	50 00 "	50	33 "	1 32	164 "
Atlanta, Ga. . .	61 80 "	62	46 "	1 84	196 "
Birmingham, Ala. .	60 00 "	60	47 "	1 88	213 "
Meridian, Miss. . .	60 00 "	60	45 "	1 80	120 "
Knoxville, Tenn. . .	50 00 "	50	33 "	1 32	164 "
Shreveport, La. . .	118 00 "	1 18	64 "	2 56	117 "
Montgomery, Ala. . .	112 00 "	1 12	47 "	1 88	67 "
Vicksburg, Miss. . .	60 00 "	60	34 "	1 36	126 "
Huntsville, Ala.				37c. per 100 lbs. for both.	

"Do you really think that under the Interstate Act you can boldly go on and thus discriminate against my shipments to the ruination of my business, which you doubtless are willing to hazard in the interest of the Standard Oil Company so long as they foot the bills, or compensate you for all damages that may accrue for such gross violations of the law?"

"I desire to call your attention to sect. 10 of the Interstate Act as a further warning from one who wants to ship his oil products over your line, and to give you notice that for every tank-car load of oil, as well as for every smaller lot, L. C. L., that you have carried since the Interstate Act has taken effect, and all such from this time forth, that discriminates or has discriminated against my shipments, I shall hold your road and all the officers concerned therein to a strict accountability for each and every offence. I emphatically protest against such gross discrimination, and call upon you to desist as an extra warning. If at any time you conclude to change your tactics upon this subject, please inform me."

June 2 came the reply, —

"Your two letters of the 30th ultimo to hand. The rates on coal oil from Cincinnati to New Orleans are at present as follows: Tank-cars, \$60 per car; barrels, 34 cents per hundred pounds.

"It will be necessary for me to communicate with my connections before I can quote rates to Mobile. I will, however, do this as early as possible. As regards the rate to Huntsville, I would explain that the Marietta & Cincinnati Company refuse to make any reduction to the local stations; therefore I could not give you a lower rate on coal oil in tank-cars than is made on barrels. We very much prefer to handle this traffic in tank-cars, and I should be glad if you could conveniently arrange to forward your oil in this manner. I completely fail to find any discrimination in this, as the rates are open to you and to all other shippers, and I shall be glad, indeed, if you can use them."

It is scarcely necessary to follow this correspondence farther. From this time on, it consists largely on the part of complainant of complaints he makes of discriminations as against barrel rates. We think and we find that complainant was unjustly discriminated against by the Cincinnati, New Orleans, & Texas Pacific Railway Company during the whole period covered by the petition filed against it, and was also unjustly discriminated against by the same railway company in connection with the Alabama Great Southern Railroad for the like period. We find that the tank rates, which were made uniform, regardless of quantity, were in themselves an unjust discrimination. The general freight agent notifies complainant that they were made on an estimate of seventy barrels capacity. A statement put in evidence by the Standard Oil Company of Kentucky, which was the principal shipper in tank-cars, showed the average capacity of tanks made use of in their shipments to be over a hundred barrels. This increased enormously the difference between rates in barrel and

Result of correspondence.
Findings of Commission.

tank shipments, which we have already found would have been excessive had the capacity of the tank-cars been no more than it was assumed to be.

We also find that there was unjust discrimination as against complainant, and in favor of the Standard Oil Company of Kentucky, in this, that from April 5 to April 21 defendant was nominally making a uniform rate on oil in barrels and in tank-cars by the hundred pounds; but it shows without dispute that the Standard Oil Company of Kentucky was during that time sending oil in tank-cars over defendant's road apparently at tank-car rates. If the rates were computed by the hundred pounds, it was not only on an assumed basis, but on one that fell far short of actual weight. In point of fact, there was no shipment whatever in tank-cars by weight.

It is noticeable also that it was not until May 28 that complainant was enabled to obtain tank-car rates to Lexington, Chattanooga, Atlanta, and other towns named in his letter of that date, yet the Standard Oil Company had all the while been shipping to those points over this road, and, of course, had rates given it.

It is further to be noted, that complainant was not, on his request for it, given the information whether, if he supplied himself with tank-cars, and sent his oil by that mode, he would be charged for the return of the empty cars. He should have been given the very important information that trackage was paid by defendant, instead of a charge exacted.

The general freight agent failed on the hearing to explain why he several times made reference in his letters to the classification of the Southern Railway & Steamship Association. The circumstances fairly called for such an explanation. It is an important fact, which this officer should have perceived, that without this classification sheet a shipper would be unable to ascertain what the rates over his road were without coming to him for them; and yet his company accepted the classification only in part, and claimed not to be responsible for it farther. He seems to ignore the fact, that, except in connection with the classification, the publication of his rates is not in compliance with the law.

It is quite possible that this officer, and also the corresponding officer of one or more of the other defendants, did not believe complainant was in good faith endeavoring to obtain tank rates for his own use. We do not ourselves know that he was. But that was no excuse for keeping from him or from anybody else a knowledge of such facts as would affect the rates. The general public had a right to know what the rates were, and any one who was contemplating even the possibility of making use

of them had special right to ask for them. Complainant had a *legal right* to know whether, when the charge was to be made by the hundred pounds, it would be on an actual weighing or on an estimate.

He had an equal right to be informed, that, instead of being charged for the return of the empty car, he would be paid for its use.

The published rate-sheets, so far as they related to rates on the lines of these defendants, ought to have given the information on both these points; and if they were blind or ambiguous, it should have been supplied on request.

The Newport News & Mississippi Valley Company, and the Louisville, New Orleans, & Texas Railroad Company, we find to have been guilty of discrimination against complainant in taking tank-cars, irrespective of capacity, on an assumption that the average capacity was eighty-five barrels, and charging therefor a rate which, as compared with the rate on barrel shipments, would have been relatively too low, had the capacity been as was assumed, and which was relatively very much too low in view of the actual capacity.

On the hearing it was insisted, on behalf of the first-named of these two defendants, that the assumption on which its rate was estimated was made in good faith, and upon information given by an agent of the Standard Oil Company of Kentucky, which was believed to be correct, but which proved not to be so. The agent who gave the information was before the Commission, and admitted giving it, but insisted it was given after the shipments in question were made, and that, as he understood the question put to him, it related to another line of cars, and not to the line in use on defendant's road. It is, perhaps, not very important now whether defendant's officer was or was not in fact misled. The mischief, so far as concerned the business of complainant, was done by giving tank-car rates instead of rates by the weight or quantity; and this wrong, which was one of policy on the part of this defendant, was made more prominent and perhaps damaging by a misstatement in the correspondence.

Complainant had expressed a purpose to obtain tank-cars for his own business, and was desirous to know whether he was to be charged by the car irrespective of the capacity. This, we have seen, was the practice on the road of this defendant; but in reply he was told that the tank-car was estimated at 20,000 pounds, and if the weight was more, the excess would be charged for. To make sure on this point, he wrote the general freight agent; and the reply, June 1, 1887, was, "A tank-car is supposed

Findings in
case of New-
port News &
M. V. and Louis-
ville, N. O. &
T. R. Cos.

Rates made by
Newport News
& M. V. R. Co.

to weigh 20,000 pounds ; if it weighs more, then we will charge for it." In point of fact, the assumption was, that the weight was very much greater ; 85 barrels at 325 pounds each would be 27,640 pounds, and the defendant did not make any additional charge when the weight reached 35,000 pounds, as it sometimes did. If this statement was made in good faith, it is difficult to account for it, and it is not accounted for. If it was the result of mere carelessness, it was not the less misleading to complainant. The necessary tendency was to discourage him from entering into competition in this mode of shipment if he had a purpose to do so, as he professed to have. Had he provided himself with cars for tank shipments, and been charged as he was told he would be, the discrimination against him would have put success in the traffic out of question.

It appears that this company had no rule or settled practice as to paying trackage for the use of tank-cars, and considered itself at liberty to deal with that subject by special contract. The facts were brought out by questions put by members of the Commission, as follows : —

Same. Evidence concerning.

"*Question.* Do you pay car service on the tank-cars ?

"*Answer.* On some cars only. We have an arrangement by which we do not pay.

"*Q.* On which do you not pay ?

"*A.* We have an arrangement with M. K. Fairbanks & Co. I do not think we pay any thing on those cars, but we haul them empty free.

"*Q.* Well, on the other cars do you pay car service the same way ?

"*A.* We are compelled to pay the same as our competitors, or we could not get the cars to handle that business. It is three-fourths of a cent a mile.

"*Q.* What do you mean by 'that, so far as this company is concerned, we do not pay mileage in either direction, or haul any empty cars free' ?

"*A.* That letter was written in April. At that time the matter was being discussed between the lines that refused to pay mileage on any cars, and because they spoke of its being abrogated by all lines.

"*Q.* Then your statement there, that you did not pay mileage, was based on the belief that the conference resulted in their refusing to pay ?

"*A.* Yes, sir, refusing to pay mileage on all empty cars ; but I told Mr. Rice in person that we would allow him the same as anybody else.

"*Q.* Is your tank-car mileage the same as it is on any other cars ?

"A. Yes, sir; three-fourths of a cent.

"Q. That is the regular mileage paid on cars?

"A. Yes, sir.

"Q. Can you specify the shippers to whom you pay mileage, and those you do not?

"A. That is an account not kept in my office, but I know that with some we have an arrangement not to pay mileage.

"Q. You have no uniform rule on that subject?

"A. That depends on the kind of agreement made on the business.

"Q. As far as you know, M. K. Fairbanks & Co. is the only concern to which you do not pay mileage; is that it?

"A. I cannot say that.

"Q. You have stated that it is the only concern you know of?

"A. No, sir; I am not prepared to say it is. I do not know it to be so, because I think possibly others are not paid mileage by us.

"Q. How is it with reference to the Union Tank Line cars?

"A. I think it very possible, but we do not keep that account in my office."

Here, it is obvious, are or may be present all the mischiefs that attend the giving of special rates and rebates. The railroad manager who supposes this to be admissible has not fully grasped the significance of those features of the Act to regulate commerce which were enacted to establish uniformity, equality, and publicity.

It is proper to say, on behalf of those two defendants, that, after the filing of the complaint, their rates were revised, and made much more reasonable and just. It is also proper to give them the benefit of the protest made by the general agent of the first-named company against being supposed to have intentionally carried the very large tanks with knowledge of the actual capacity. If the officer was misled, as he claims to have been, the blame should fall upon the party deceiving him. We cannot say in this case that there was any thing more than an honest misapprehension, and are inclined to think that such was the fact; but one of the difficulties attending cases of this nature is, that, while the law imposes severe penalties on the carrier and its agents for acts on their part designed or calculated to create discrimination as between shippers, it imposes none on shippers themselves who by artifice, misrepresentation, false billing, or other deception of the carrier, secure advantages to themselves which it would be illegal and punishable for the carrier voluntarily to grant. If, therefore, the agent of the Standard Oil Company

**Defendants
misled by false
information.**

had purposely misled the defendant's officer in the matter referred to, and thereby obtained an unfair advantage, the complainant would be without redress, unless, on the ground of negligence, defendant could be held responsible for acting upon the false information.

The Illinois Central Railroad Company we find to have discriminated unjustly against complainant by making some of the barrel rates excessively high as compared to those on tank-car shipments, and also by shipping at car rates irrespective of quantity, while leading complainant to understand that if the capacity exceeded a specified minimum, the excess would be charged for.

Case of the
Illinois Cent.
R. Co. Found
to have dis-
criminated.

From the evidence it appears that during the period in controversy tank-car shipments were made over the road of defendant to New Orleans only. To points to which no tank-car shipments were made, this defendant did what was also done by the Louisville & Nashville Railroad Company in some cases, — made the same rates by the hundred pounds, whether shipments were in tanks or barrels. If these equal rates were offered to the public in good faith, defendant ought to be compelled to give the like uniform rates to points to which tanks were sent; and if they were not offered in good faith, the defendant ought to be held estopped by its own rate-sheets from disputing the justice of this uniform rule.

Same. Evi-
dence and cor-
respondence.

But in this case we find, as we have so often found in others, that parties applying for tank-car rates are misled into supposing they are graded by quantity, when in fact they are uniform by the tank-car.

May 3, 1887, the general freight agent of defendant wrote complainant as follows:—

"Yours without date. I replied to your previous letter promptly, stating that the rate on oil from Cairo (according to the tariff sent you) when in full car-loads would take fourth class, released, whether in tanks or barrels, which will give the information desired."

May 4 he wrote again, —

"Yours of the 30th ultimo. Our rates on oil in car-loads, released, 20,000 pounds and over, Cairo to Jackson, Miss., 50 barrels and over, \$1.65 per barrel; in tank-cars, 24,000 pounds and over, 37 cents per hundred pounds; Cairo to New Orleans, in barrels or tank, car-loads, 24,000 pounds and over, 24 cents per hundred pounds.

"We have no rates at present in effect from Cleveland, but would refer you to H. Coope, Ga., O. & W. Railroad, Cincinnati,

O., for rates from that point to New Orleans and Jackson, Miss., via Odin."

What is noticeable in these letters is, that the rate given is the same on shipments in the two modes, and that a minimum car-load rate is mentioned. The agent explains in oral testimony before the Commission that the rates here specified were old rates temporarily restored, and that there was a complete revision of rates afterwards.

May 31 the agent writes complainant, —

"Rates on oil. — I have your much-appreciated favor of the 26th instant. We charge for actual weights on oil, whether in tanks or barrels; and, as previously advised, our rates are to all shippers alike.

"Tanks which are hauled one way loaded are at present returned without extra charge in the same manner as other foreign cars are handled.

"The Mississippi Valley joint classification makes coal oil in car-loads, whether in wood or in tanks, fourth class, which rates we charge to points taking Mississippi Valley joint classification."

The agent says of this letter in his oral evidence, —

"That refers to oil to local stations. It does not refer to New Orleans, as Mr. Rice had been repeatedly advised what the rate was there."

Now put this in plain English, it is this: Defendant proposed to charge for actual weight on oil in tanks to the points *only* to which no shipments in tanks were made. The offer of equal rates to the shippers in barrels was therefore illusory.

Sept. 30 complainant wrote the general freight agent, —

"I desire and propose to build twenty tank-cars immediately to run over your lines, provided you will assure or guarantee me as low net rates as you accord to any other shipper, regardless of quantity shipped; also that you will carry oil for me in tank-cars from any point or station on your line, to points on and beyond your lines, at the same proportionate (or division of a through-rate) that you receive or get out of the most favored shipper.

"Please state how large capacity of tank-cars you would allow to run over your road, and how large tank-cars have been used on your road; please answer promptly."

The answer, Nov. 2, is as follows: —

"Rate on oil from Cairo. — Upon returning to my office after an absence of several weeks out on the line, I find your favors of Sept. 30 and Oct. 13.

"Coal oil or its products in barrels is now third class; if released, sixth class; actual weight to be charged for each case, but not less than 24,000 pounds per car-load. I trust this heavy

reduction in our local rates will enable you to do a large business over our line. As regards our guaranteeing you as low net rates as other shippers are charged, I have repeatedly assured you that our rates are the same to all shippers, and I do not know that I can do any more than already stated in this matter.

"I believe the largest tank-cars we have ever hauled over our line contained about 40,000 pounds, and as low as 20,000 pounds.

"I trust these new rates will enable you to ship over our line not only to the strictly local stations, but to Jackson, Tenn., Holly Springs, Grenada, and Jackson, Miss., as well, at all of which points there is a good trade.

"We would also like to handle business for you to Aberdeen, West Point, and Starkville, Miss., which points we can reach via Durant & C., A. & N. Railroad."

This answer was as polite as it was misleading. The party writing desires us to understand that it had no reference to shipments to New Orleans, though nothing in it or in the letter to which it was an answer would restrict it in any such way; and how this officer could reconcile it to his duty to his own company or to the public to allow shipments of 40,000-pound tanks to New Orleans at the rates charged on tanks of 20,000 pounds, he fails entirely to explain, as he does also to explain or excuse his discrimination in this regard between shipments to New Orleans and those complainant might make to other points to which the other shippers over defendant's line were not sending tank-cars.

Here, again, the question of paying for the use of the tank-cars comes in question. It has been seen that on May 31 the general freight agent wrote, "Tanks which are hauled one way loaded, are at present returned without extra charge, *in the same manner as other foreign cars are handled.*" What is meant by this, we do not know. All the evidence adduced before us tends to show the rule to be, that foreign cars are not merely returned without charge, but that their use is paid for.

This officer being on the stand, the following proceedings took place :—

"Q. What mileage do you pay for the use of tank-cars?"

"A. I have nothing to do with mileage.

"Q. Have you no knowledge as to the amount of mileage paid?"

"A. If there is any paid, it is three-fourths of a cent, the same as other cars. We make no discrimination in that matter.

"Q. You treat one car the same as you do the other?"

"A. That is my understanding."

If the general freight agent of the defendant did not know what the rule was on this important subject, it may be safely assumed that the defendant made no publication which gave the

information to the general public. So long as that was the case, a protest that the defendant makes no discrimination is not very assuring. The public was entitled to information given in an authoritative way as a part of the rate-sheet itself, and should not have been left to suppose or imagine that it was or might be the subject of private arrangement.

Nothing in these cases more distinctly challenges attention than the fact that several of the defendants, while giving tank rates regardless of the quantity carried, informed complainant, when interrogated by him on the subject, that if the quantity exceeded a certain specified weight, a charge would be made for the excess. The published rate-sheets ought to have given clear and reliable information on the subject, and it was only because they were silent or ambiguous that the inquiries became neces-

Giving tank rates regardless of quantity, while informing complainant otherwise.

sary. The remarkable thing about the matter is, that so many of these defendants should make the same mistake; a mistake, too, that it was antecedently so improbable any one of them would make. The Louisville & Nashville, the Cincinnati, New Orleans, & Texas Pacific, the Newport News & Mississippi Valley, and the Illinois Central Companies are all found giving out the same erroneous information, and no one of them can tell how or why it happened to be done, much less how so many could contemporaneously, in dealing with the same subject, fall into so strange an error. It is to be noted, too, that it is not a subordinate agent or servant who makes the mistake in any instance, but it is the man at the head of the traffic department, and whose knowledge on the subject any inquirer would have a right to assume must be accurate. In no case is the error excused: and if it be conceded that there was no purpose to mislead, the case is not relieved of unpleasant features; for gross negligence, when it is damaging, may be equally culpable with wrongs of intent.

In our review of these cases, two facts have been constantly pressing upon attention, as constituting cogent if not conclusive proof that the several defendants operating lines east of the Mississippi were not endeavoring by their tariff sheets to adjust their rates on grounds of relative justice, as between themselves and their patrons, and also between the two classes of patrons, and that the considerations which they say in their answers and testimony entitled them to make the higher charge on barrel shipments were not controlling in the fixing of rates.

Facts to show that defendant's tariff sheets did not adjust rates justly.

- One of these facts is, that they make tank-car rates regardless of quantity. It cannot be said that this was done in ignorance of the great difference which existed. It clearly appears that it was generally known that the differences were very great. If it had

not been known, it should have been. The evidence shows that the weight and capacity of the tank-cars of the Standard Oil Company of Kentucky were not stenciled upon them, as was the case with the like cars of some other lines : but the difference in size must have been very obvious to the eye ; and defendants, it is to be presumed, had the means at any of their important stations to weigh or gauge them.

The other fact is, that the discriminations were made on no principle, and could not possibly have been measured from a consideration of the circumstances which defendants say entitled them to impose the heavier charges on the traffic carried on in barrels. Sometimes the rates were made the same ; and when that was the case, no reason has been assigned therefor which would embrace all the cases and distinguish them from other cases in which the discriminations were very great ; but when discriminations were made, the excess in charge upon barrel shipments varied from 20 per cent to 200 or more. Neither greater risks, greater expense, competition by water transportation, nor any other fact or circumstance brought forward in defence, nor all combined, can account for these differences. The conclusion is irresistible that the rate-sheets were not considerately made with a view to relative justice.

We have thus, with as much brevity as was practicable in view of the great bulk of evidence, reviewed these cases, and expressed our conclusions. It remains only to direct what orders shall be entered in these cases respectively.

The orders to
be entered in
the cases.

In the case against the Louisville & Nashville Railroad Company, order will be entered that the defendant do forthwith cease and henceforward abstain from the unjust discrimination found to exist in its charges for the transportation of petroleum oils as between shipments in barrels and in tanks, and from making any higher charges by the hundred pounds for the transportation of the oils in barrels, including the barrels, than it makes or shall make contemporaneously for the transportation of the like weight of the oils in tanks.

It will be further ordered in the same case, that the said defendant do forthwith cease and hereafter abstain from making uniform rates for the transportation of petroleum oils by the tank-car instead of by weight or quantity when the capacity of the tank-cars in use on the lines of road is not uniform or nearly so ; the necessary effect of such uniform rates by the tanks being to establish unjust discriminations, and to give to shippers of oil in tanks undue and unreasonable preference and advantage.

In the case against the St. Louis, Iron Mountain, & Southern Railway Company, order will be entered that the defendant do

forthwith cease and henceforward abstain from the unjust discrimination found to exist in its charges for the transportation of petroleum oils as between shipments in barrels and in tanks, and from making any higher charges by the hundred pounds for the transportation of the oils in barrels, including the barrels, than it makes or shall make contemporaneously for the transportation of the like weight of the oils in tanks.

In the case against the Cincinnati, New Orleans, & Texas Pacific Railway Company, order will be entered in the same terms as the order above directed to be entered against the Louisville & Nashville Railroad Company.

In the case against the Cincinnati, New Orleans, & Texas Pacific Railway Company, and the Alabama Great Southern Railroad Company, order will be entered in the same terms as the order above directed to be entered against the Louisville & Nashville Railroad Company.

In the case against the Newport News & Mississippi Valley Company, and the Louisville, New Orleans, & Texas Railroad Company, order will be entered in the same terms as the order above directed to be entered against the Louisville & Nashville Railroad Company.

In the case against the Newport News & Mississippi Valley Company and the Illinois Central Railroad Company, order will be entered in the same terms as the order above directed to be entered against the Louisville & Nashville Railroad Company.

In the case against the Illinois Central Railroad Company, order will be entered in the same terms as the order above directed to be entered against the Louisville & Nashville Railroad Company.

In the case in which the Illinois Central Railroad Company is sole defendant, it is unnecessary to enter any order at this time. In so far as discriminations have arisen from rates on tank shipments, they will be corrected by this company if the order made against it in the case last above mentioned is observed. As to the further controversy which this case presents, what is said in the cases against the Mobile & Ohio and the Mississippi & Tennessee Railroad Companies is directly in point.

In each of the cases in which an order is to be made, as above stated, a report and finding of facts and conclusions is entered herewith, and is to be considered a part hereof.

The following is the report and finding in the case against the Louisville & Nashville Railroad Company.

**Report and
Finding in case
of Louisville &
N. R. Co.**

The parties in this case having brought the same to a hearing on oral proofs and printed arguments, and the same having been duly and fully considered, the Commission now finds from such proofs the facts following: —

That the defendant, the Louisville & Nashville Railroad Company, is, and was on the 22d day of July last, and for several years theretofore has been, a common carrier engaged in the transportation for hire of property by a continuous carriage or shipment by means of railroads owned, leased, or operated by it from Cincinnati, in the State of Ohio, to Louisville, Lexington, Frankfort, Bloomfield, and Bardstown, in the State of Kentucky; to Nashville, Guthrie, and Memphis, in the State of Tennessee; to Montgomery, Mobile, and Selma, in the State of Alabama; to New Orleans, in the State of Louisiana; to Evansville, in the State of Indiana; and to St. Louis, in the State of Missouri; and from Cincinnati aforesaid and Louisville aforesaid to all points on its lines of railroad between said cities and the several other points above named.

That complainant is, and has been ever since the fifth day of April, 1887, engaged at Marietta, O., and its vicinity, in the business of producing, manufacturing, and dealing in petroleum oils, and shipping them to various markets in the Southern and Western States, and has during all the time aforesaid been desirous of making use of the services and facilities of the defendant as such common carrier as aforesaid for the transportation of such oils from Cincinnati and Louisville aforesaid to other points above named, and to other Southern and Western points of sale.

That, in order to have such facilities and to obtain such services, complainant repeatedly, from the said fifth day of April, 1887, up to July 22, 1887, applied to the said defendant, its agents and officers, for rates upon the transportation of such oils; and that defendant made to complainant, when it gave rates to him for such transportation, on such applications, charges which were not reasonable and not just, but were excessive, and in violation of the first section of the Act of Congress to regulate commerce, approved Feb. 4, 1887.

That the method in which complainant offered oil for transportation on defendant's lines of road, and on which such excessive charges were made as aforesaid, was in barrels; that he had many competitors in the markets to which he proposed to ship the same, the principal of which was the Standard Oil Company of Kentucky, which shipped oils principally in large tanks, a tank of oil constituting a car-load; that defendant from said fifth day of April, 1887, up to July 22, 1887, all the while made rates on the transportation of oils in tanks which were relatively greatly lower than the rates it made contemporaneously on the transportation of oils in barrels, and, in doing so, defendant was guilty of unjust discrimination as against complainant, contrary to the provisions of sect. 2 of said Act to regulate commerce.

That in so making rates on the transportation of oil in tanks which were relatively greatly lower than the rates contemporaneously given on the transportation of oil in barrels, defendant was guilty of giving undue and unreasonable preference and advantage to the said Standard Oil Company of Kentucky, and to all other persons and corporations who delivered petroleum oils to it for transportation on its roads, and of subjecting the complainant to unreasonable prejudice and disadvantage, contrary to the provisions of sect. 3 of said Act to regulate commerce.

That said defendant during all the period aforesaid was further guilty of unjust discrimination against said complainant, and of giving further undue and unreasonable preference and advantage to the said Standard Oil Company of Kentucky, and to all other persons and corporations who delivered petroleum oils to it for transportation in tanks by giving to them tank-car rates, irrespective of quantity carried in the tanks, though the tanks greatly differed in capacity and in load, the necessary effect of which was greatly to increase the difference between the rates for the transportation of the oils in tanks and in barrels respectively, though the same was otherwise too great and unjustly discriminating as before stated; the so giving of tank-rates under the circumstances being in violation of sects. 2 and 3 of said Act to regulate commerce.

That said excessive rates and charges, and said unjust discriminations, and the giving of said undue and unreasonable preference and advantage, all concerned and had respect to consignments of oils made or offered by complainant for transportation from one of the States of the United States into or through one or more other States of the United States, over the roads of the said defendant, operated by it in interstate commerce as a common carrier as aforesaid.

That complainant was wronged and damnified by such excessive rates and charges, and by the unjust discrimination aforesaid, and by the undue and unreasonable preference and advantages given to others as aforesaid.

That no higher charge can rightfully be made by defendant for the transportation by the hundred pounds of such oils in barrels, including the barrels, than is or shall be contemporaneously made for the transportation by the hundred pounds of such oils in tanks, and that order should be made that said defendant do forthwith cease and desist from making such higher charge.

That order should further be entered requiring defendant wholly to cease and desist from making uniform rates for the transportation of petroleum oils by the tank-car, irrespective of weight or quantity, when the capacity of the tank-cars in use on its line is not uniform or nearly so, and also wholly to cease and

desist from further giving undue and unreasonable preference and advantage to the Standard Oil Company of Kentucky, and to others shipping oil in tanks, over complainant and others shipping oil in barrels.

For a further understanding of the reasons leading the Commission to its conclusions, reference is made to the opinion in this case and in other cases heard with it, which is this day entered of record herewith, and is to be considered a part hereof.

- The findings in the cases against the Cincinnati, New Orleans, & Texas Railway Company; against the same company and the Alabama Great Southern Railroad Company; against the Newport News & Mississippi Valley Company; and against the same company and the Illinois Central Railroad Company, — were in substance the same as the foregoing.

Findings in
other cases.

The following is the finding in the case against the St. Louis, Iron Mountain, & Southern Railway Company.

The parties in this case, having brought the same to a hearing on oral proofs and printed arguments, and the same having been duly and fully considered, the Commission now finds from such proofs the facts following:—

Finding in case
against St.
Louis, I. M. &
S. R. Co.

That the defendant, the St. Louis, Iron Mountain, & Southern Railway Company, is and was on the twenty-second day of July last, and for several years theretofore had been, a common carrier engaged in the transportation for hire of property by a continuous carriage or shipment, by means of a line of railroad owned and operated by it, from the city of St. Louis, in the State of Missouri, to the cities of Newport and Little Rock, in the State of Arkansas, and the city of Texarkana, in the State of Texas, and beyond.

That complainant is, and has been ever since the fifth day of April, 1887, engaged at Marietta, O., and its vicinity, in the business of producing, manufacturing, and dealing in petroleum oils, and shipping them to various markets in the Southern and Western States, and has all the time aforesaid been desirous of making use of the services and facilities of defendant, as such common carrier as aforesaid, for the transportation of such oils from St. Louis aforesaid, and from other points on the line of defendant's road to points in other States.

That, in order to have such facilities and obtain such services, complainant repeatedly, from the said fifth day of April, 1887, up to July 22, 1887, applied to said defendant, its agents and officers, for rates upon the transportation of such oils, and that defendant made to the complainant for such transportation, on each of such applications, charges which were not reasonable and just, but were excessive, and in violation of the first section of the Act to regulate commerce, approved Feb. 4, 1887.

That the method in which complainant offered oils for transportation on defendant's line of road, and on which such excessive charges were made as aforesaid, was in barrels; that he had many competitors in the markets to which he proposed to ship the same, the principal of which was the Waters-Pierce Oil Company of St. Louis, Mo., which company shipped principally in large tanks, a tank of oil constituting a car-load.

That defendant, from said fifth day of April, 1887, up to July 22, 1887, all the while made rates on the transportation of oil in tanks which were relatively greatly lower than the rates it made contemporaneously on the transportation of oils in barrels; and, in doing so, defendant was guilty of unjust discrimination as against complainant, contrary to the provisions of sect. 2 of said Act to regulate commerce.

That in making rates on the transportation of oil in tanks which were relatively greatly lower than the rates contemporaneously given on the transportation of oil in barrels, defendant was guilty of giving undue and unreasonable preference and advantage to the said Waters-Pierce Oil Company of St. Louis, Miss., and to all other persons and corporations who delivered petroleum oils to it for transportation on its road, and of subjecting the complainant to unreasonable prejudice and disadvantage, contrary to the provisions of sect. 3 of said Act to regulate commerce.

That said excessive rates and charges, and the giving of said undue and unreasonable preference and advantage, all concern and refer to consignments of oil made or offered by complainant for transportation from one of the States of the United States into or through one or more other States of the United States over the road of the said defendant, operated by it in interstate commerce, as a common carrier as aforesaid.

That complainant was wronged and damnified by such excessive rates and charges, and by the unjust discrimination aforesaid, and by the undue and unreasonable preference and advantage given to others, as aforesaid; that no higher charge ought to be, or can rightfully be, made by the defendant for the transportation by the hundred pounds of such oils in barrels, including the barrels, than is or shall be contemporaneously made for the transportation by the hundred pounds of such oils in tanks, and that order should be made that said defendant do forthwith cease and desist from making such higher charge, and thereby giving undue and unreasonable preference and advantage to parties shipping oil in tanks over complainant and others shipping oil in barrels.

For a further understanding of the reasons leading the Commission to its conclusions, reference is made to the opinion in this case and in other cases heard with it, which is this day entered of record, and which is to be considered a part hereof.

RIDDLE, DEAN, & Co.

v.

BALTIMORE & OHIO R. Co.

(*Interstate Commerce Commission, Feb. 23, 1888.*)

Discrimination in furnishing Cars. — A statement of the evidence, from which it appears that it was the duty of the Yough Slope mine, its owners and agents, to have inquired of the station agent of the railroad company near by the mine on the thirtieth day of August, 1887, and on the next day, by which they would have learned that the mine could have obtained cars for the shipment of coal to Arthur and Boylan at Cleveland, O., and they having failed to do this, in consequence of which the Youghioghenny and Ashtabula mines received nearly all these cars for this purpose, without any partiality or preference on the part of the railroad company, — *held*, upon these facts that a complaint of unjust discrimination against the Yough Slope mine, and in favor of the Youghioghenny and Ashtabula mines, cannot be sustained.

Facts which may be shown by Carrier to rebut Inference of Discrimination arising from Circumstances. — Where a complaint is made by a shipper that an unjust discrimination was perpetrated by a railroad company against him at a particular time named, in a case like the present, to rebut the inference arising from circumstances calling for explanation, amongst other evidence, the carrier may show that during a long course of business neither it nor any of its agents have ever shown any unfriendly spirit whatever toward the shipper, and that, on the contrary, its agents immediately before the matter complained of made extra exertions in good faith to serve the shipper in obtaining cars for him from the connecting line to which the shipper had to look for such cars.

Carrier notifying Shippers as to obtaining Cars. — In the absence of some custom and rule of business placing such duty upon the carrier to notify the shipper without inquiry on the part of the latter of the fact that he can then obtain cars for the movement of his freight, it is the duty of the shipper, by reasonable inquiry made to the proper agent of the railroad company, to obtain this information for himself; but in a case like the present, if the carrier took upon itself the duty of actually notifying the Youghioghenny and Ashtabula mines on the 30th of August, 1887, without waiting for any inquiry on their part, that they could get cars, then, in like manner, it was its duty to have notified the Yough Slope mine at the same time that it could get cars. *Held*, that, tested by these rules, no case of preference or unjust discrimination is made out by the evidence in favor of the Youghioghenny and Ashtabula mines, and against the Yough Slope mine.

J. L. Black, Esq., counsel for petitioners.

John K. Cowen, Esq., and *H. L. Bond, Esq.*, counsel for defendant.

BRAGG, Commissioner. — The complaint in this proceeding charges that the Baltimore & Ohio Railroad Company does not give the mines represented by petitioners their proportion of cars each day, and that this company unjustly discriminates against them by furnishing cars to others.

Facts.

The complainants are sales agents of the Yough Slope mines, situated near West Newton, on the Baltimore & Ohio Railroad. These unjust discriminations are charged to have been committed during the month of August and the early part of September, 1887, — namely, commencing with the 10th of August and ending on the third day of September following, — on cars that should have been furnished for shipments of coal from said mine to Arthur & Boylan at Cleveland, O. Various exhibits are attached to the petition in the shape of correspondence relating to the alleged discriminations, and also lists of cars which it is claimed were furnished to the Yough Slope mine and to other adjacent mines during the period to which the complaint refers.

The answer of the Baltimore & Ohio Railroad Company neither admits nor denies that the complainants were sales agents for the Yough Slope mine, or that on Aug. 10, 1887, they received an order to ship five cars per day to Arthur & Boylan, of Cleveland, O. It admits the receipt of memorandum, copy of which is filed with complaint, marked Exhibit No. 2, but states that in the distribution of coal cars to the mines along the line of its road it has necessarily to deal directly with the mines, and cannot recognize or notice the orders of third parties; the practice being, that each mine makes out a daily requisition for such cars as it needs on blanks furnished by the railroad company for the purpose. It states that all the cars used for shipments of coal from mines on the lines of its road over the Pittsburgh & Western Railroad to Cleveland are owned by the Pittsburgh & Western Railroad Company or its leased lines, and that the Baltimore & Ohio Railroad Company in distributing those cars to the mines acts only as the agent of the Pittsburgh & Western Railroad Company and under its direction; that the route for coal from mines on the respondent's road to Cleveland for Pittsburgh & Western cars is by way of the respondent's road to Pittsburgh, the Pittsburgh Junction road to Allegheny City, the Pittsburgh & Western road to Akron, and the Valley Railway to Cleveland.

There is, however, direct delivery by the Baltimore & Ohio Railroad to the Pittsburgh & Western Railroad on the line of the Junction road. The Pittsburgh & Western Railroad and the Valley Railway are distinct and independent roads, and in no way controlled by the Baltimore & Ohio Railroad Company. It states that on the 10th of August, 1887, it had previously received an order, then in force, from the Pittsburgh & Western Railroad Company to allow no cars belonging to the Pittsburgh & Western Railroad Company to be loaded with coal for Cleveland; that on the 19th of August, at the instance of the Yough Slope mine, D. C. Bachelor, train-master of the

respondent, endeavored to have the standing order referred to revoked as the to Yough Slope mine, and for that purpose sent J. T. Johnson, the superintendent of the Pittsburgh & Western Railroad, a telegram in the following words :—

“Can coal for Pressly & Arthur and Arthur & Boylan, Cleveland, go forward from Yough Slope? Answer quick.”

To which telegram the following answer was received from Superintendent Johnson :—

“No, sir; I cannot take coal for Presley & Arthur or Arthur & Boylan until further orders. Do not allow any of our cars to be loaded with coal or slack unless you have immediate shipment for it.”

That all of the respondent's dealings in regard to the business between the mines on its road and Cleveland were carried on directly with the Pittsburgh & Western Company; that it has no direct dealings with the Valley Railway Company in regard to such business. The respondent cannot, therefore, state with certainty whether the orders as to the shipments of coal to Cleveland above stated were made by the Pittsburgh & Western Company on its own motion, or whether they were directed by the Valley Railway; but it is informed and believes that such orders were, at least in part, dictated by the Valley Railway Company. The order of Aug. 19, 1887, contained in the telegram last quoted, was not revoked until Aug. 30, when Train-Master Bachelor received the following telegram from Superintendent Johnson :—

“Please send along Arthur & Boylan coal. Valley will receive it.”

It denies that it in any way discriminated or intended to discriminate against the Yough Slope mine in the distribution of cars for the shipment of coal to Arthur & Boylan and other consignees in Cleveland, but alleges, that, on the contrary, it did not distribute any cars to any mines on its road for the purpose of making Cleveland shipments, and it could not do so against the orders of the Pittsburgh & Western Railroad Company, which was the owner of the cars; that in regard to the comparison made in the petition filed in this matter between the cars furnished the Yough Slope mine and those furnished the Youghiogheny and Ashtabula mines, the respondent says that such a comparison is unjust and misleading, as made in the petition; that, as appears by the petition itself, the Yough Slope mine had orders for but five cars a day to be shipped over the Pittsburgh & Western Railroad, and those five cars were for Cleveland shipments. The Youghiogheny and Ashtabula mine, on the other hand, was a large shipper not only to Cleveland, where its consignees were Arthur & Boylan and Presley & Arthur, but

also to Fairport, a point on the Pittsburgh & Western system. Its orders for shipments over the Pittsburgh & Western Railroad were some twenty-five cars a day, or five times that of the Yough Slope mine. The shipments made by the Youghioghenny and Ashtabula mine, as well as those by the Yough Slope mine, consigned to Arthur & Boylan at Cleveland, between Aug. 20 and Aug. 30, inclusive, were made despite the orders to the contrary issued by the respondent under the instructions issued by the Pittsburgh & Western Company. The cars so loaded were furnished with instructions that they should not be loaded for Cleveland; but both mines in question did load coal from their mines for Cleveland, as shown by Exhibit No. 12, filed with the petition. The respondent took the cars so loaded, and delivered them to the Pittsburgh & Western Railroad; but whether they were transported by that road, respondent is unable to say. It admits that Exhibit No. 12, filed with the petition, is a correct statement of the number of cars shipped by the different mines consigned to Arthur & Boylan at Cleveland, with the exception that the number of cars loaded on Sept. 3 for the Yough Slope mine should be five instead of one. The number of Pittsburgh & Western route cars shipped by the Yough Slope mine from Aug. 20 to Sept. 3 was twenty-three instead of sixteen, as appears by Exhibit No. 12.

It avers that the owners of the Yough Slope mine do not have, or claim to have, any complaint or grievance against this respondent in regard to the distribution of cars to that mine, and that said owners have no interest in, nor do they approve of, the present proceeding, as will appear by letter dated Oct. 31, 1887, from R. H. Lattimore, general manager of the Yough Slope mine, addressed to Mr. J. V. Patton, superintendent of the Baltimore & Ohio Railroad, Pittsburgh, Penn., a copy of which is attached to respondent's exhibit as an exhibit.

It alleges that on the 10th of October, before the filing of this petition, the order of Arthur & Boylan for five cars per day, referred to in the petition, was revoked. The respondent, therefore, alleges that, having satisfied the owners of the Yough Slope mine that there was and is no discrimination or intention to discriminate, as appears by the letter referred to, the present petition should be dismissed by this Commission, and the petitioners be relegated to their remedy by suit at law, if any they have.

At the hearing it was agreed between the counsel of the parties that the grievances complained of should be confined to the period between the 30th of August and the 4th of September, 1887. This, of course, greatly narrowed the investigation. Evidence was permitted to be introduced as to the dealings

of the parties from the middle of June, 1887, relating to the furnishing of cars by the respondent to the Yough Slope mine and other mines along its line for whatever light, if any, this might throw upon what occurred during the period complained of. By the agreement of counsel above mentioned, it was conceded that the respondent had satisfactorily explained to the petitioners all the alleged grievances mentioned in the complaint, except those averred to have occurred between the 30th of August and the 4th of September, 1887.

From the evidence before us we find the material facts to be, that the Yough Slope mine is in the State of Pennsylvania, and is situated on the Pittsburgh Division of the Baltimore & Ohio Railroad, near West Newton, about thirty-three miles south of Pittsburgh. The Pittsburgh Division of the Baltimore & Ohio Railroad extends from Cumberland, in the State of Maryland, to Pittsburgh, in the State of Pennsylvania, a distance of 150 miles. Near the Yough Slope mine are the Youghiogheny and Ashtabula mines, and numerous other mines situated upon the Pittsburgh Division of the Baltimore & Ohio Railroad, in the State of Pennsylvania.

The route by which coal is carried over respondent's railroad to Cleveland, in the State of Ohio, is by the Baltimore & Ohio Railroad to Pittsburgh, a distance of about 33 miles ; by the Pittsburgh Junction Railroad to Allegheny City, a distance of 4.47 miles ; by the Pittsburgh & Western Railroad from Allegheny City to Akron, O., a distance of 135.3 miles ; and by the Valley Railroad from Akron to Cleveland, a distance of 35 miles. The Pittsburgh Junction Railroad is a mere link of connection between the Baltimore & Ohio Railroad and the Pittsburgh & Western Railroad ; and they pay to it \$2 for each loaded freight-car received by or delivered to them over its line, which rate, it provided by the contract, may be less if the earnings of the Pittsburgh Junction Railroad exceed a certain amount named in the contract. The Pittsburgh & Western Railroad Company and the Valley Railroad Company are each separate, distinct, and independent corporations. The Pittsburgh & Western Railroad extends from Allegheny City, in the State of Pennsylvania, to Orville in the State of Ohio, a distance of 160 miles ; and it has what it calls its Lake Division, extending from Niles, in Pennsylvania, to Painesville, in the State of Ohio, — virtually at Fairport, on Lake Erie, — a distance of 51 miles. The distance from Allegheny City to Niles on the Pittsburgh & Western Railroad is 85½ miles. The Pittsburgh & Western Railroad also has what is called its Northern Division, extending from Callery Junction, in Pennsylvania, to Mount Jewett in the State of Pennsylvania. The Valley Railroad extends from Cleveland, O., to

Valley Junction in the same State, a distance of 75 miles, and crosses the Pittsburgh & Western Railroad at Akron.

We find on file in our office the Baltimore & Ohio Railroad Company's through coal tariff No. 1, taking effect April 1, 1887, which embraces through-rates on coal from the mines mentioned to Cleveland, Fairport, Cuyahoga Falls, Girard, Monroe Falls, and a large number of other points east and west of these mines. We also find on file in our office a supplement, No. 3, of the Baltimore & Ohio Railroad Company to the above through coal tariff No. 1, published April 25, 1887. These tariffs are still in force. We find no joint coal tariffs existing between the Baltimore & Ohio Railroad Company, the Pittsburgh & Western Railroad Company, or between either of these and the Valley Railroad Company, nor do we find joint tariffs or joint agreements of any kind between any of these last-named railroads, and the evidence shows nothing of the kind; and although it may be probable that some arrangements of this character exist between them, yet, in the absence of evidence on the subject, we are not authorized to find such to be the fact.

This, however, was not the only route by which the mines mentioned in the complaint might have shipped coal to Cleveland during August and the early part of September, 1887; for they might have shipped by the Baltimore & Ohio and the Pittsburgh & Lake Erie Railroad, and the New York, Pennsylvania, & Ohio Railroad, but this would have involved extra switching charges.

The petitioners, Riddle, Dean, & Co., reside at Pittsburgh, and during the summer and fall of 1887 were sales agents of the Yough Slope mine in finding markets and purchasers for its coal. Through their efforts and negotiations, about the middle of June five car-loads of coal from this mine were shipped to Arthur & Boylan, large coal dealers in Cleveland, as a sample lot. Under a contract or arrangement to this effect, subsequent lots of coal from this mine were shipped to Arthur & Boylan, at Cleveland, at intervals during the period intervening between the first shipment and the 19th of August. On the 19th of August, and for a short period prior thereto, there had been a direct order in force to the Baltimore & Ohio Railroad from J. T. Johnson, superintendent of the Pittsburgh & Western Railroad, not to allow any coal cars to go forward to Cleveland until further notice.

On the 19th of August, D. C. Bachelor, train-master of the Baltimore & Ohio Railroad Company, telegraphed J. T. Johnson, superintendent of the Pittsburgh & Western Railroad Company, —

“Can coal for Presley & Arthur and Arthur & Boylan, Cleveland, go forward from Yough Slope? Answer quick.”

To this telegram on the same day Superintendent Johnson replied by telegram, —

“No, sir: I cannot take coal for Presley & Arthur or Arthur & Boylan until further notice. Do not allow any of our cars to be loaded with coal or slack unless you have immediate shipment for it.”

Again, on the same day, a telegram was sent from the office of the superintendent of the Pittsburgh & Western Railroad Company to Bachelor: —

“Presley & Arthur and Arthur & Boylan have on hand at this writing 27 cars of Baltimore & Ohio coal; do not think it advisable to receive shipments for a few days; will advise you.”

Under these orders and instructions, coal did not go forward from the mines along the Baltimore & Ohio Railroad (the Yough mine included) until the 31st of August.

On the 23d of August, 1887, petitioners wrote a letter to Arthur & Boylan, Cleveland, O., in which they say, —

“Owing to the Baltimore & Ohio Railroad and Valley Railway refusing to receive any more coal for you, we will ship you about 20 cars via New York, Pennsylvania, & Ohio route. We will pay switching on same. What is wrong? Are you blocked?”

To this, Arthur & Boylan, by letter of date Aug. 25, 1887, replied, —

“Yours of 23d received, and in reply would say the Valley Railway say they have not stopped any of our coal. Do not ship us any coal via New York, Pennsylvania, & Ohio.

On the 30th of August a telegram was sent by Superintendent Johnson, of the Pittsburgh & Western Railroad Company, to D. C. Bachelor, train-master of the Pittsburgh Division of the Baltimore & Ohio Railroad: —

“Please send along Arthur & Boylan coal; Valley will receive it.”

During the afternoon of the 30th of August the following telegram was sent by Bachelor to all the depot agents for all of the mines along the Pittsburgh Division of the Baltimore & Ohio Railroad: —

“Coal for Arthur & Boylan can now come forward.”

Under date of Aug. 30, 1887, at Allegheny, Superintendent Johnson wrote petitioners the following note: —

“I received a message this A.M. from Superintendent Smith of the Valley, after departure of your representative, saying they would receive coal for Arthur & Boylan, and immediately notified the Baltimore & Ohio to let it come forward.”

This note was received that day by petitioners, and was immediately forwarded by them to R. H. Lattimore, general manager of the Yough Slope mine, at West Newton, Pennsylvania.

Hearing of no coal shipped, as they would in the ordinary course of business, if any had been forwarded, at noon on the 2d of September, W. H. Riddle, of the firm of Riddle, Dean, & Co., took a train from Pittsburgh to the Yough Slope mine, which is only a short distance, and went there. After conferring with Lattimore, and finding that the Yough Slope mine had received no cars, the two went together to the Youghiogheny and Ashtabula mines, which are near by, and there found the sidings of the Youghiogheny and Ashtabula mines filled with cars. At that time the Yough Slope mine had only one car of the Pittsburgh & Western Railroad. The next day Riddle went to the way-master's books, from which he obtained a statement of the cars shipped from the Yough Slope, Youghiogheny, and Ashtabula mines respectively during the period between the 30th of August and the 3d of September. From this statement, which is in evidence before us, it appears that during that time the Yough Slope mine, while ordering 85 cars, received only 6 cars, and the Youghiogheny and Ashtabula mines, ordering 80 Western cars, received 48.

The manner in which mine-owners are furnished cars for the shipment of coal by the Pittsburgh Division of the Baltimore & Ohio Railroad is shown by the evidence. Each agent and each mine-owner is furnished blanks; and at four o'clock each afternoon they fill in the blanks, — the number of cars on hand loaded and ready for forwarding, the amount on hand for the morrow's haul, and how many cars they require. This information is telegraphed to the superintendent of the railroad, and the original order follows by mail to confirm the telegraphic request.

This is condensed by the car distributor, and during the night the empty cars are distributed to the various mines, according to instructions.

It is an event of frequent occurrence for the mines to alternate in receiving cars during the season; that is, one mine for two or three days will have no cars, and then the next succeeding several days it will have abundance of cars: and this method is said to be more economical for the miners, and to be preferred by them. Another phase of this business is, that mine-owners frequently, when cars are scarce, call for twice as many cars as they really need, in order, as they say, that they may be sure to get enough; and this was done often by the Yough Slope mine during the month of August, 1887, as its general manager, Lattimore, who is also owner of a one-fourth interest in the Yough Slope mine, admits as a witness on the stand. He admits that while the Yough Slope mine was calling on the Baltimore & Ohio Railroad Company for twenty and twenty-five cars a day from the 15th of August to the last of that month,

this mine did not really need and could not use more than one-half that number. He also admits that he occasionally preferred not to have cars for two days at a time, because it was more economical for him to do so, and that this was so understood and agreed on between him and the authorities of the Baltimore & Ohio Railroad Company. While admitting all his fault-finding complaints to his agents, the petitioners, against the Baltimore & Ohio Railroad Company, as shown in evidence, he now says, as a witness on the stand, "that, take the season through, we received as many cars as our neighbors;" and again, "During the whole season we were treated very well. There was no complaint to make." Referring to what occurred between the 30th of August and the 4th of September, this witness testifies, —

"I do not consider we were discriminated against. I consider it an oversight that the agent did not notify me until the fourth morning the embargo was raised."

During the summer of 1887 the capacity of the Youghioghenny and Ashtabula mines was about twice as great as that of the Yough Slope mine. In the same period the shipments of coal from the Yough Slope mine were largely to Cleveland, over a route in which there was very frequent trouble to obtain cars; while the shipments of coal from the Youghioghenny and Ashtabula mines were chiefly to Fairport, over a route in which there was no trouble about a sufficiency of cars. The general manager of the Yough Slope mine, Lattimore, testifies that for this reason Mr. Day, whom we suppose from the connection in which his name occurs was an officer connected with the Baltimore & Ohio Railroad Company, advised the witness to ship his coal to Fairport, where he could get plenty of cars, and have no trouble; but Lattimore testifies he was anxious to introduce his coal in the Cleveland trade.

To negative the idea of unjust discrimination during the period complained of, between the 30th of August and the 4th of September, as far as this might, if at all, the Baltimore & Ohio Railroad Company introduced in evidence statements of the cars it furnished during the period from the 15th of August to the third day of September, 1887, to these respective mines on east and west bound shipments. From these it appears, that, of the total cars furnished during this last period, the Youghioghenny and Ashtabula received 203 cars, and the Yough Slope mine received 146, divided as follows:—

West-bound Shipments.

Youghioghenny and Ashtabula	163 cars.
Yough Slope	57 "

East-bound Shipments.

Youghiogheny and Ashtabula	40 cars.
Yough Slope	89 "

On shipments of coal to Cleveland during the same period last referred to, the cars furnished the mines were as follows :—

Youghiogheny and Ashtabula	36 cars.
Yough Slope	33 "
Republic	40 "
West Newton	15 "
Amirville	8 "
Osceola	26 "
Eureka	1 "

To further negative any inference of unjust discrimination upon the facts as far as this might do, if at all, the Baltimore & Ohio Railroad Company shows by the evidence that during the month of August, 1887, and the period to which this complaint relates, owing to the amount of business it had to do upon its own line, and the amount of its car equipment in use for that purpose on its Pittsburgh Division, it could not and did not permit its cars to go away from its own line to carry coal for any shippers ; and that during that time coal from these mines to Cleveland had to be transported in the cars of the Pittsburgh & Western Railroad Company, which were used for that purpose ; and that, in distributing these cars among the mines along its Pittsburgh Division, the respondent did so as the agent of the Pittsburgh & Western Railroad Company, and in making this distribution divided these cars among the mines ratably, fairly, and without preference to any one mine over another. The cars of the Valley Railroad Company do not appear to have been used in this business during last season, though prior to that time they had been.

The question to which our conclusions must be directed upon this evidence is whether, in violation of the Act to regulate commerce, the Baltimore & Ohio Railroad Company was guilty of unjust discrimination in failing to furnish cars to the Yough Slope mine between the 30th of August and the 4th of September, 1887, for shipments of coal to Arthur & Boylan, at Cleveland, O., and during that period unjustly discriminated in favor of the Youghiogheny & Ashtabula mines by furnishing cars to them. This is the only issue in the proceeding.

The cars to be furnished were the cars of the Pittsburgh &

Western Railroad Company, and they were to be distributed to these mines by the Baltimore & Ohio Railroad Company. An embargo, as it is called by the witnesses, had been existing from Aug. 19 to Aug. 30, during which time no cars were furnished by the Pittsburgh & Western Railroad Company to the respondent for the shipment of coal from these mines to Cleveland, O. The embargo itself is not now made a subject of complaint in this proceeding, and the agreement of the counsel of the parties at the hearing concedes that it has been accounted for to the petitioners upon grounds that are satisfactory to them. On the 30th of August this embargo was raised by a telegram from Johnson, superintendent of the Pittsburgh & Western Railroad Company, to Bachelor, master of trains of the Baltimore & Ohio Railroad Company, informing the latter that coal shipments to Arthur & Boylan, Cleveland, O., could then come forward. On the same day Johnson, at Allegheny, wrote a note to petitioners at Pittsburgh, as agents of the Yough Slope mine, giving them the same information; and this note was at once forwarded by them to Lattimore, general manager of the Yough Slope mine, at West Newton. As soon as Bachelor received Johnson's telegram, he at once telegraphed to all the depot agents for the mines along the Pittsburgh Division of the Baltimore & Ohio Railroad Company, "Coal for Arthur & Boylan can now come forward." It appears that the Youghioghenny and Ashtabula mines received this information, and sent in their requisitions for cars, and were at once furnished; but it also appears that the Yough Slope mine either did not receive this information promptly, or did not act on it until the 4th of September.

Existence of embargo during which no cars were furnished.

The evidence as to the time when the Yough Slope mine first received intelligence that the embargo was raised, and that coal for Arthur & Boylan could go forward, is peculiar. It is certain that on the 30th of August petitioners mailed to Lattimore, general manager of the Yough Slope mine, the letter of the superintendent of the Pittsburgh & Western Railroad Company, by which he would have learned that the embargo was raised, and that coal could then go forward for Arthur & Boylan. That letter Lattimore should have received the night of the 30th of August or the next morning; yet, when Lattimore was a witness on the stand, he does not state when he received that letter, or that he ever received it at all. The superintendent of the Pittsburgh Division of the Baltimore & Ohio Railroad Company, as a witness on the stand, testifies that as soon as it was known by him and Bachelor that the embargo was raised, at once a telegram was sent to all the depot agents for the mines along his division

Evidence as to giving Yough Slope mine information that embargo had been raised.

that coal could then come forward for Arthur & Boylan. If neither Lattimore, the general manager of the Yough Slope mine, and none of his subordinates received the notice contained in this telegram, he should have so testified on the stand; but when he was on the stand as a witness, he neither expressly admits nor denies that the notice in this telegram was received by him or some of his subordinates earlier, but leaves the inference to be drawn that it was not by saying, —

“I do not consider we were discriminated against. I considered it an oversight that the agent did not notify me until the fourth morning that the embargo was raised.”

The inference is, that “the agent” to whom he refers was the depot agent of the Baltimore & Ohio Railroad Company at West Newton station. If, on the night of the 30th of August or the next morning, Lattimore received the letter of Johnson forwarded to him by petitioners, he then knew that the embargo was raised, and he was not bound to wait on the agent; but it was his duty to have at once telegraphed for the cars needed for his mine, and have forwarded its requisition; but he did nothing of the kind. Certainly William H. Riddle, one of the petitioners, must have informed Lattimore during the afternoon of the 2d of September that the embargo was raised, and he should have then telegraphed for the cars needed for his mine, and have forwarded its requisition; but it does not appear he did so. It is a familiar rule of law that a party who has been injured by another in such way as is here claimed, must not make the matter worse by failing to perform a plain and obvious duty on his part, and then make the damage added by his own negligence or recklessness a ground of complaint.

The embargo had been prevailing for eleven days on shipments of coal to Cleveland from all these mines by way of the Baltimore & Ohio, the Pittsburgh & Western, and the Valley Railway, up to the 30th of August, when it terminated. If there was any custom or course of business by which it became the duty of any agent of the Baltimore & Ohio Railroad Company to notify Lattimore, as general manager of the Yough Slope mine, of the fact that this embargo had ended, without waiting for any inquiry upon the subject from Lattimore or some agent of the Yough Slope mine, this should have been shown by the evidence, and the burden of proof was on petitioners to show it; but there is no evidence of any such custom or course of business. In the absence of any such evidence, the act of any of the agents of the Baltimore & Ohio Railroad Company in notifying Lattimore that the embargo had ended would seem to rest alone upon the idea, that, having sent notice of this fact to depot agents of the other mines, the Baltimore & Ohio Railroad Company should, as a

matter of fairness, have in a like manner sent notice to the depot agent at West Newton for the Yough Slope mine also ; and this last is true. The evidence tends to show that the Baltimore & Ohio Railroad Company did undertake and attempt in good faith, so far as we can see, to notify all these mines (the Yough Slope mine included) in the same manner, by telegraph, and at the same time, during the afternoon of the 30th of August, that the embargo that had prevailed upon shipments of coal to Cleveland was then at an end, and that they could forward their coal, and that this notice was then sent to the depot agent at West Newton for the Yough Slope mine. Whether the Youghiogheny and Ashtabula mines received their notice of their depot agent before or after inquiring of him, is not shown by the evidence. If the Yough Slope mine failed to receive that notice, as the other mines did, it would appear upon the evidence to have been its misfortune, largely mixed with its own fault. If the Yough Slope mine was then suffering for want of cars, a daily inquiry made of any of its agents of the station agent of the Baltimore & Ohio Railroad at West Newton, near by this mine, would have revealed the fact that this embargo had ended the very day it was raised, and would have been as natural, as proper, as inexpensive, as free from inconvenience, as it would have been business-like, and as clearly a matter of duty they owed the owners of the mines ; but nothing of this kind appears to have been done. While carefully guarding their rights in all matters to which it relates, the Act to regulate commerce does not proceed upon the theory that shippers are absolved from all duty in looking after the delivery of their freight to railroads for carriage. It would require more credulity than discrimination to believe, upon the evidence before us, that the Yough Slope mine was suffering for want of cars during the period elapsing between the 30th of August and the 4th of September, 1887.

It is manifest from the evidence that neither the Pittsburgh & Western Railroad Company nor the respondent attempted to conceal from the Yough Slope mine the fact that the embargo was raised ; but, on the contrary, Johnson, the superintendent of the Pittsburgh & Western, informed the petitioners, who were the agents of that mine, of the fact on the 30th of August, and on the same day it was telegraphed by Bachelor to all the station agents of the Pittsburgh Division of the Baltimore & Ohio Railroad Company along its line. Other facts in evidence tend to negative the idea of any unjust discrimination. On the 19th of August, Bachelor, the master of trains of the Pittsburgh Division of the Baltimore & Ohio Railroad Company, sent an urgent telegram to Johnson, the superintendent of the Pittsburgh & West-

Facts negative
any idea of
discrimina-
tion.

ern, to know if coal from the Yough Slope mine could go forward to Arthur & Boylan, at Cleveland, O. Taking the period from the 15th of August to the 4th of September, 1887, when the greatest trouble for cars existed, and it shows that the Yough Slope mine received considerably more cars in proportion to its need for them than did the Youghiogheny and Ashtabula mines, and this, too, while the shipments of the latter were chiefly to Fairport, upon a line where there was no trouble about a sufficiency of cars, and the former was shipping in large part to Cleveland, Girard, Monroe Falls, and Cuyahoga Falls, over a line where there was great trouble about a sufficiency of cars. Not a single instance is shown by the evidence where the respondent or any of its officers or agents have ever manifested any unfriendly spirit toward the Yough Slope mine, in its business or otherwise. The general manager of the Yough Slope mine, who owns a one-fourth interest in that mine, while admitting as a witness on the stand that he had frequently been dissatisfied, and had complained during last August, because he did not get all the cars he needed at all times, yet stated that during the entire season his mine had been treated as well in the matter of cars as any of its neighbors, and utterly repudiated the idea that there had been any unjust or unfair discrimination by the respondent against the Yough Slope mine.

After a careful consideration of all the evidence adduced by the parties in this proceeding, we are of the opinion, and so find, that it fails to show that the Baltimore & Ohio Railroad Company was guilty of unjust discrimination under the Act to regulate commerce in failing to furnish cars to the Yough Slope mine for shipment of coal to Arthur & Boylan, at Cleveland, O., between the 30th of August and the 4th of September, in the year 1887.

The order of the Commission is, that this petition be, and the same is hereby, dismissed.

Discrimination in Use of Equipment. — Regular Patrons not entitled to Preference. — In *Riddle, Dean, & Co. v. N. Y., L. E. & W. Co. and Pittsburgh & L. E. R. Co.*, 1 Inter. St. Com. Com. 594, the general freight agent of the Erie Company testified to the effect that in November, 1887, his road was not able to meet the demands of its "regular patrons" for cars, and that the use of any part of the equipment of the line for carrying coal to Cincinnati would have been disastrous to other interests by reason of the time which would necessarily be consumed by the cars in going and returning. He explained that by "patrons" he did not refer simply to people doing business on the line of the Erie road, but also to shippers of coal in the vicinity of Pittsburgh who were dependent upon the cars of the Erie for transportation, which were furnished "to the Pittsburgh & Lake Erie to distribute to our patrons there:" which cars were rapidly moved between Cleveland and Pittsburgh, carrying coal and ore in the manner above described. He apparently acted upon the

idea that he was entitled to look out for the needs of shippers who had an established business and course of traffic over his line, in preference to the requirements of an occasional shipper, or of one whose dealings might be limited in extent, and were sure to terminate soon.

Commissioner Walker said, —

“ This, in short, is a claim that regular customers are entitled to preference over occasional customers. It was supported by abundant proof that the opportunity for profitable shipment of coal to Cincinnati was exceedingly unusual, and might never again occur.

“ This claim, supported by this fact, presents no justification for the refusal to undertake the carriage of the coal. A common carrier is under obligation to serve the public equally and justly; it is unlawful for him ‘to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever.’ He must know no friends, and concede no unequal favors. The opportunity for profit of a stranger in a single and unusual transaction should be held as important by the carrier as the traffic of a constant shipper; no preference should be given to either. It is the duty of a common carrier to provide adequate equipment for the business of his line; if, in time of special pressure, some one must wait, the annoyance must be distributed with all possible equality. It is in contravention of the statute for a common carrier to refuse a shipment upon the ground that regular patrons desire to use all the facilities at hand, and to appropriate to the uses of the latter the entire available equipment.

“ It is not necessary for a shipper to make a special contract with a common carrier in order to entitle himself to transportation for his goods. A common carrier, by virtue of his assuming that position, and thereby becoming entitled to the privileges, liens, and protections given by statute and at the common law, becomes at the same time bound to carry the merchandise of all, for a reasonable reward, whenever tendered in the usual way. The difference between a common carrier and a private carrier consists largely in that obligation which arises without special agreement. The compensation of the common carrier is assured to him by a lien upon the goods, a right which is not enjoyed by a private carrier; in case the articles tendered for transportation are not surely worth the freight money, his right to demand payment in advance has long been recognized; his interests are well protected in every direction, and he has no right to refuse to accept for transportation, at a reasonable rate, any article of such a nature as he is accustomed to transport from any person seeking the service.

“ The Act to regulate commerce requires that a tariff for the transportation of merchandise be established by interstate common carriers, and that the charges shall be reasonable and just. Every description of merchandise is included within the protection of this provision of the law. Common carriers have no right to withdraw from the transportation of any articles not dangerous to handle, and which are ordinarily the subject of transportation by them. Less desirable traffic must be accepted upon reasonable terms, as well as that which is more desirable. In this matter, as in many others, the principles of the Act to regulate commerce, in prohibiting undue and unreasonable preferences and advantages, are simply declaratory of the common law. The common carrier has no right to select either goods or customers. In the present case the commodity in question is one of the chief articles transported upon defendants’ lines, and the points between which its movement was desired are points between which general business is solicited; yet the witness testified that his road is not engaged in carrying coal and ore into Cincinnati. His tariff-sheet in this respect was better than his practice, for a reasonable rate to Cincinnati on coal was announced in a formal joint tariff to which the Erie road was a party; and when coal was offered for shipment thereunder, the

party tendering it was as much entitled to have it transported as was any mine-owner or shipper of coal in the Pittsburgh region.

"It was the duty of the carrier to make every reasonable exertion to get it forward without unjustly prejudicing the rights of others in respect to the freight which each contemporaneously tendered.

"It is not meant by this that the Erie Company was bound to furnish gondola cars for this shipment, but it was bound to make an effort to furnish some sort of cars to move the coal, either gondolas or others. It refused wholly to do any thing: it had a large equipment aside from its gondolas; it made no effort to appropriate any other cars to this service, or to obtain cars elsewhere. It does not appear that complainants had any preference as to what kind of cars were furnished, if only the coal could go forward. At the end of one of their letters demanding cars, they said that gondolas were what they wanted, obviously meaning that the service required was that to which gondolas were customarily appropriated; but it was not their duty to demand other cars if defendants refused the use of a fair distributive share of gondolas; in such case it was not complainants' but defendants' business to look up other vehicles of carriage.

"The real reason why gondolas were refused to complainants for the tendered shipments to Cincinnati was no doubt correctly stated by said general freight agent in his testimony, as follows:—

"Q. Then, do I understand you refused gondola cars for the transportation of coal to Cincinnati because you needed them in this trade you have already mentioned?

"A. Yes; we refused them because we needed them in this trade, and were able with a smaller number of cars to take care of a larger number of shippers and consignees by having the cars within our own control.

"The trade referred to was the carrying of ore from Cleveland to Youngstown and Pittsburgh, and coal from the vicinity of those places to points on the Erie road east of Akron.

"The explanation amounts to this: That he refused to permit gondolas to carry this coal because he could make more money by using them on the eastern portion of his line, where return loads of ore were obtainable, and where more frequent trips could be made; thus enabling him to serve a larger number of customers with a smaller number of cars. It needs no argument to show that this reasoning presents no excuse for rejecting complainants' business; and while refusing gondolas for this reason, the general freight agent made no effort to supply their place in any other form, but simply refused the shipment."

MARTIN

v.

CHICAGO, BURLINGTON, & QUINCY R. Co. *et al.*

(*Interstate Commerce Commission, June 19, 1888.*)

Crews v. Richmond D. R. Co. affirmed. — The principles laid down in the case of *Crews v. Richmond & Danville R. Co.*, 32 Am. & Eng. R. R. Cas. 496, restated and re-affirmed.

Small Towns entitled to Rates as Favorable as Large Ones. — Trade-centres or large commercial towns are not as a matter of right entitled to have more favorable rates than the smaller towns for which they form distributing centres; and if carriers shall give to such smaller towns rates as favorable as to the larger, the Commission will not interfere.

Same. — **Fact that one Town has Advantage over another does not show Undue Preference.** — The fact that, under rates which are impartially arranged as between large and small towns, one large distributing centre may have an advantage over another in competition for the business of the small towns, does not make out a case of undue preference in favor of the one distributing centre as against the other. Impartial rates are not rendered illegal by their effect upon the business of localities.

Same. — **Rates to Distributing Centres and Smaller Towns.** — A distributing centre, however great or important, cannot demand as a matter of right that the rates from a common source of supply to more distant and smaller towns shall be made up of the sum of the rate to itself and the rate thence to such smaller towns. But the carriers may make rates from the common source of supply to the smaller towns directly, as single rates; and if the single rate is less than the sum of the two which are made to and from the distributing centre, it is not for that reason necessarily objectionable.

Theory upon which Case may be decided. — A case cannot be decided on a theory which is neither presented by the complaint nor advanced on the taking of the testimony.

Local and Through Rates. — What constitutes local and what through rates considered.

J. M. Woolworth and W. F. Griffiths for complainants.

J. M. Thurston for Union Pacific R. Co.

W. C. Goudy for Chicago & North-western R. Co.

C. J. Greene for Chicago, Burlington, & Quincy and the Burlington & Missouri River R. Cos.

J. W. Cary for Chicago, Milwaukee, & St. Paul R. Co.

COOLEY, Chairman. — The original petition in this cause was filed Nov. 16, 1887, and the grievance alleged was the following:—

That the several defendant railroads, by joint tariffs agreed upon and promulgated through a common agent, were charging upon the first five classes of merchandise from Chicago to Lincoln, Fremont, Wahoo, Beatrice, and Blue Springs, stations located upon the Union Pacific Railway system in the State of Nebraska, rates as follows : —

Facts and
pleadings.

CLASSES —	1.	2.	3.	4.	5.
To Lincoln	1.00	.84	.57	.41	.35
Wahoo	1.00	.84	.57	.41	.35
Fremont	1.00	.84	.57	.41	.35
Beatrice	1.15	1.00	.70	.55	.40
Blue Springs	1.15	1.00	.70	.55	.40

That the said defendant companies were at the same time charging, by tariffs in like manner agreed upon and promulgated, from Chicago to Omaha, upon the said five classes of merchandise, rates as follows: 1st, .90; 2d, .75; 3d, .50; 4th, .35; 5th, .30; and from Omaha to the Nebraska points above mentioned as follows : —

CLASSES —	1.	2.	3.	4.	5.
To Lincoln . . . . .	.33	.28	.23	.19	.15
Fremont . . . . .	.26	.24	.22	.19	.15
Wahoo . . . . .	.26	.24	.22	.19	.15
Beatrice . . . . .	.50	.40	.35	.25	.20
Blue Springs . . . . .	.50	.40	.35	.25	.20

That the differences between the rates from Chicago to the interior points named and the rates from Chicago to Omaha, plus the rates from Omaha to the same points, are,—

CLASSES —	1.	2.	3.	4.	5.
To Lincoln . . . . .	.23	.19	.16	.13	.10
Fremont . . . . .	.16	.15	.15	.13	.10
Wahoo . . . . .	.16	.15	.15	.13	.10
Beatrice . . . . .	.25	.15	.15	.05	.10
Blue Springs . . . . .	.25	.15	.15	.05	.10

Upon this statement of facts it was charged : —
1. That the city of Omaha was unlawfully discriminated against, and subjected to undue and unreasonable prejudice and disadvantage within the meaning of the third section of the Act to regulate commerce.
2. That by reason of the freight tariffs thus arranged, and in effect the city of Chicago was largely and unlawfully benefited to the detriment of the city of Omaha.
After answers had been filed, but before the case had been set down for hearing, the complainants filed an amended petition,

alleging therein that the defendants had made and promulgated new freight tariffs on merchandise from Chicago to stations located on the Union Pacific Railway system in the State of Nebraska, which discriminates still more severely against the business interests of Omaha, and afford increased preferences to the city of Chicago. The amended petition proceeds to give the charges by the new tariffs on the first five classes of merchandise from Chicago to sixty-one Nebraska points named. It is not deemed important to mention all these points here; but a few, with the charges to them respectively, are given:—

CLASSES —	1.	2.	3.	4.	5.
To Elkhorn . . . . .	.80	.65	.44	.33	.28
Wahoo . . . . .	.80	.65	.44	.34	.28
Lincoln . . . . .	.80	.65	.44	.34	.28
Beatrice . . . . .	.95	.81	.57	.48	.38
Fremont . . . . .	.80	.65	.44	.34	.28
Blue Springs . . . . .	.95	.81	.57	.48	.38
Cedar Rapids	1.37	1.14	.89	.70	.59
Hastings	1.15	1.03	.72	.53	.46
Buda	1.30	1.17	.85	.65	.55
Sidney	2.00	1.78	1.48	1.21	1.05
Kimball	2.25	1.91	1.55	1.25	1.05

It is averred by complainants that the rates made by said defendant companies from Chicago to Omaha at the same time, upon the same classes of merchandise, are as follows: 1st class, .75; 2d, .60; 3d, .40; 4th, .30; 5th, .25.

It is further averred that the rates charged by the Union Pacific Railway Company from Omaha to the points named are at the same time as follows:—

CLASSES —	1.	2.	3.	4.	5.
To Elkhorn . . . . .	.19	.17	.16	.12	.10
Wahoo . . . . .	.26	.24	.22	.19	.15
Lincoln . . . . .	.33	.28	.23	.19	.15
Beatrice . . . . .	.50	.40	.35	.25	.20
Fremont . . . . .	.26	.24	.22	.19	.14
Blue Springs . . . . .	.50	.40	.35	.25	.20
Cedar Rapids . . . . .	.62	.54	.49	.40	.35
Hastings . . . . .	.54	.48	.42	.40	.34
Buda . . . . .	.65	.60	.50	.45	.39
Sidney	1.25	1.18	1.08	.91	.81
Kimball	1.50	1.31	1.21	.98	.90

And, further, that the differences between the rates per ton from Chicago to the interior Nebraska points named and the rates from Chicago *plus* the rates from Omaha to said Nebraska points, are as follows:—

CLASSES —		1.	2.	3.	4.	5.
To Elkhorn	. . . . .	2.80	2.40	2.20	1.80	1.20
Wahoo	. . . . .	4.20	3.80	3.60	3.00	2.40
Lincoln	. . . . .	5.60	4.60	3.80	3.00	2.40
Beatrice	. . . . .	6.00	3.80	3.60	1.40	1.40
Fremont	. . . . .	4.20	3.80	3.60	3.00	2.20
Blue Springs	. . . . .	6.00	3.80	3.60	1.40	1.40
Cedar Rapids	. . . . .					.20
Hastings	. . . . .	2.80	1.00	2.00	3.40	2.60
Buda	. . . . .	2.00	.60		2.00	1.80
Sidney	. . . . .					.20
Kimball	. . . . .			1.20	.60	2.00

It is further represented that the Chicago, Burlington, & Quincy Railroad Company has, conjointly with the Burlington & Missouri River Railroad Company, established rates from Chicago to thirty-five named points in Nebraska located on the Burlington & Missouri River Railroad, and that the differences expressed in rates per ton between those rates and the rates from Chicago to Omaha *plus* the rates from Omaha to said Nebraska points by way of said Burlington & Missouri Railroad as shown by its local freight tariff, are as follows to the points named, which are some of the thirty-five mentioned:—

CLASSES —		1.	2.	3.	4.	5.
To Lincoln	. . . . .	5.60	4.60	3.80	3.00	2.40
Hastings	. . . . .	2.80	1.00	2.00	3.40	2.80
Wahoo	. . . . .	4.20	3.80	3.60	3.00	2.40
Beatrice	. . . . .	6.00	3.80	3.60	1.40	1.40
Blue Springs	. . . . .	6.00	3.80	3.60	1.40	1.40
Hebron	. . . . .	2.80	1.00	2.40	3.60	3.40

- Upon this showing the complainants charge:—
1. That the defendant companies “are now actually violating the Interstate Commerce Law, inasmuch as they have authorized and are now using freight tariffs from Chicago to interior Nebraska points, which tariffs are heavily discriminating against the city of Omaha, and as heavily discriminating in favor of the city of Chicago, to our great detriment and disadvantage, and which discrimination we respectfully submit is made unlawful by the terms of the third section of the law. . . .
- “2. That the city of Omaha is unlawfully discriminated against, and is subjected to undue and unreasonable prejudice and disadvantage within the meaning of the third section of the Interstate Commerce Law.
- “3. That, by reason of freight tariffs thus arranged and in effect, the city of Chicago is largely benefited to our detriment,— a condition clearly forbidden, not only by the general tenor of the law, but involving a distinct violation of the third section.”

And the complainants pray that the Commission "will so order that freight tariffs between the city of Chicago and all interior Nebraska points be hereafter constructed on a basis that shall give the city of Omaha an equal chance with Chicago as a market and distributing-point for west-bound traffic for the State of Nebraska."

The defendants answered the amended complaint as follows:—

The Chicago, Burlington, & Quincy Railroad Company and the Burlington & Missouri River Railroad Company in Nebraska, answering jointly, deny that said rates effect any unlawful discrimination in favor of Chicago or against Omaha, or that they are contrary to the letter or spirit of the third section of the Act to regulate commerce; and they aver that the rates between Chicago and Omaha and between Chicago and interior Nebraska points are just, reasonable, non-discriminating, and in accordance with the letter and spirit of said Act.

The Chicago & North-western Railway Company avers that the rates are lawful and reasonable; denies that Omaha is thereby unlawfully discriminated against or subjected to undue and unreasonable prejudice and disadvantage, and avers that the freight carried by it to the several points mentioned in the complaint is so carried without going through Omaha, and that Omaha is on a different line from that on which the business is conducted to the other points named in Nebraska. It avers further, that "there is a contest between the business-men of the city of Omaha and those of the city of Lincoln, each claiming to be the distributing-point for the State of Nebraska, and each demanding more favorable rates from the carriers than those allowed to the other; but this respondent avers that the rates established by the tariffs now in force are in every respect reasonable and just." The answer also raises the question of the competency of complainants as an unincorporated body to institute the proceeding.

The Chicago, Milwaukee, & St. Paul Railway Company answered the original petition only; but, when the amended petition was filed, elected to stand upon the answer instead of filing another.

The answer claimed that defendant has the shortest line of railroad from Chicago to Omaha; that it has nothing to do with the making of rates from Omaha to the five Nebraska points named in the original petition, but accepts the rates made by connecting lines; that the Chicago, Burlington, & Quincy is the shortest line from Chicago to Lincoln, and by that line the distance from Chicago to Lincoln is 549 miles, which is but 41 miles greater than the distance from Chicago to Omaha by the same line; "that the distance from Chicago to Omaha by this

respondent's railway and the Union Pacific is 490 miles; to Wahoo, 519 miles; to Fremont, 537 miles; to Lincoln, 558 miles; to Beatrice, 623 miles; and to Blue Springs, 637 miles; that the distance from Chicago to Omaha is 95 per cent of the whole distance from Chicago to Wahoo by the line of this respondent and the Union Pacific, and more than 90 per cent of the whole distance from Chicago to Fremont by the same route, and nearly 90 per cent of the entire distance from Chicago to Lincoln, about 80 per cent of the entire distance from Chicago to Beatrice, and 78 per cent of the entire distance from Chicago to Blue Springs; that said distance from Chicago to Omaha is also 90 per cent of the entire distance from Chicago to Lincoln by way of the Chicago, Burlington, & Quincy; that the tariff of freight charged by the respondent from Chicago to Omaha is only 90 per cent of the rate charged from Chicago to Lincoln, Wahoo, and Fremont, and 79 per cent of the rate charged from Chicago to Beatrice and Blue Springs on first-class freight, and on all other classes of freight named in said complaint the rate from Chicago to Fremont and the other points named is less than that percentage. A division of the rates charged, as stated in the complaint, from Chicago to the points in Nebraska west of Omaha, on a strictly mileage basis, would give a higher rate than is now charged to Omaha on shipments to each of the places named except Blue Springs, and the proportion to Omaha on shipments to that point would amount to nearly 90 cents on first-class freight."

The answer further says, that "the complaint does not state that the rates to Omaha are too high, but complains that the rates to points beyond Omaha are too low, and asks that the several respondents shall be restrained and compelled to withdraw the freight tariffs in reference to points west of Omaha, and substitute therefor such freight tariffs from Chicago to the Nebraska points in question as shall be just and equitable to the reasonable demand of the city of Omaha to be considered as the chief distributing-point for Nebraska, and substantially asks to have rates to all points west of Omaha increased; but this respondent respectfully shows that the rates now in force are not in any respect in violation of any provision of the Interstate Commerce Act, and that they are substantially upon a mileage basis, and that it is not competent for railway companies under said Act to so arrange their tariffs as to make any particular city or point the chief distributing city or centre for the freight of any particular State, and that no such practice can be recognized or enter into the making of tariffs under the Interstate Commerce Act."

The answer of the Chicago, Rock Island, & Pacific Railway

Company avers the rates complained of to be just, and denies any unjust or unlawful discrimination or preference.

The answer of the Union Pacific Railway Company denies responsibility for rates east of Omaha, justifies the rates actually made by it, and avers them to be just, reasonable, and non-discriminating.

On issues thus made, the case was brought to a hearing at Omaha, March 19, 1888, and was submitted on testimony given and arguments made in open sessions. The testimony was not voluminous, and was directed in the main to showing that the rates complained of operated injuriously to the business interests of Omaha.

W. A. L. Gibbon, wholesale dealer for three years in iron, steel, and hardware, testified that the rates had a very injurious effect on the wholesale business of Omaha. His house had been compelled to give up the trade in a great many towns where they formerly did business, because they could no longer do business there except at a sacrifice of their profits. He gave an instance of an order for a car-load of iron from Fremont. But the freight from Chicago to Omaha was 30 cents, and from Omaha to Fremont 19 cents, while from Chicago to Fremont it was 35 cents. The figure he made on the iron was 12 cents higher than was offered at Chicago, and the Chicago dealer got the trade. He gave another instance of a sale at Lincoln, which he was only enabled to make by having the goods shipped directly from the mill, though he had the same goods in stock, and should have preferred to ship from Omaha. The witness testified how rates were customarily made, as follows :—

“We purchased goods in Boston, New York, Troy, Philadelphia, Pittsburgh, Johnstown (Penn.), Youngstown (O.), Cleveland, and other places. These are the principal towns that we buy our goods at. The manufacturers would sell goods sometimes at the mill, sometimes delivered at Chicago, and sometimes in Omaha. We bought in these ways, and of course became familiar with the rates from these points, both to Chicago and Omaha. With very few exceptions the through-rate was the sum of the two local rates; that is, the rate from the mills to Omaha was the sum of the rate from the mills to Chicago, and the rate from Chicago here. That was the universal rule and is.”

In answer to a question, what it is precisely which the people of Omaha demand, the witness said, —

“The only rule we advance is, that the rates between competing trade-centres should be made nearly, if not exactly, upon the basis of the sum of the two locals. We don't care any thing about the locals purely, as that is a private matter for the railroad

companies to adjust. But this rule that we want is the one that covers shipments from the Atlantic seaboard to the Missouri River. We want that same rule here."

Further on the following proceedings took place : —

"By Mr. THURSTON : —

"Q. Mr. Gibbon, are you Omaha people willing to have the same rule applied, which you now contend for, to shipments made from Omaha, Lincoln, and Fremont to points common to all?

"A. Yes, sir; unquestionably.

"Q. You are willing to have the rate from Omaha to Kearney, on the Union Pacific Railroad, made of the sum of the locals from Omaha to Fremont and from Fremont to Kearney?

"A. That's a ridiculous comparison, sir; Kearney is not a distributing centre.

"Q. Are you willing, as a merchant of Omaha, to have the rate from Omaha to Beatrice made up of the sum of the locals from Omaha to Lincoln, and from Lincoln to Beatrice?

"A. That is the same comparison. Beatrice is not a distributing centre. When Beatrice becomes a distributing centre, we are willing to recognize it.

"Q. How about Lincoln?

"A. We are willing to recognize that as such.

"Q. And Fremont?

"A. Yes, sir.

"Q. You are willing that these two towns should be afforded these rates, then? They are interior Nebraska points.

"A. A town of consumption and of distribution are two entirely different sort of points.

"Chairman COOLEY. Do I understand that this principle that you are contending for is, that this method of making up the rates shall apply from Omaha to trade-centres, and from thence to small towns beyond?

"A. It is to be applied to Omaha in connection with competing trade-centres and towns beyond.

"Mr. THURSTON : —

"Q. To all towns beyond?

"A. Yes, sir.

"Q. This is to apply to Omaha, Fremont, and Lincoln?

"A. Yes, sir.

"Q. And applied from Fremont to all these other towns beyond, irrespective of their being trade-centres?

"A. It should apply from trade-centres to all these towns.

"Q. Then it would apply from Fremont to all these towns the same as regards Omaha?

"A. Yes, sir.

"Q. So that Fremont could buy and sell goods as cheap as you can?

"A. Yes, sir.

"Q. And as cheap as Chicago?

"A. Yes, sir.

"Q. It is a matter of no moment that the place of ultimate destination is not a trade-centre?

"A. I don't understand the point you want to make.

"Q. I do not want to make any point, but simply want to know what you think should be the application of this principle? Is it a matter of any moment to the application of this principle that the point of the ultimate destination of the goods is not a trade-centre?

"A. No, not of any moment. It is simply to place the distributing centres on a par in competing for the trade of these points of ultimate destination.

"Commissioner WALKER. Do you recognize the existence of any distributing centre between here and Chicago?

"A. We don't come in competition with any distributing centre west of Chicago to amount to any thing.

"Q. There are distributing centres in Iowa on the Mississippi River?

"A. Yes, sir.

"Q. Do you think the same rule should be applied to them?

"A. Yes; as far as we are concerned, we want to recognize all distributing centres.

"Q. I suppose, then, that you think, according to your rule, that the rate from Chicago to Omaha should be the rate from Chicago to the Mississippi River, plus the rate from there to Des Moines, plus the rate from Des Moines to Omaha?

"A. If Des Moines were competing for Omaha business against Chicago, that would be the rule.

"Chairman COOLEY. Does not Des Moines come into competition with you through all this country in which you trade?

"A. I never heard of Des Moines in competition with Omaha.

"Mr. GOUDY. Is it not true that Des Moines sells furniture out through this country?

"A. It is a business I am not engaged in, — a traffic that I am not familiar with.

"Q. You don't know just what traffic Des Moines does have, then?

"A. No, sir.

"Mr. WOOLWORTH. You are well acquainted with the whole course of business in this town?

"A. Yes.

"Q. And if Des Moines did business in this country, you would know it?"

"A. To any considerable extent; yes, sir.

"Q. And neither Des Moines nor any other Iowa town comes into competition with Omaha for the Western business?"

"A. I never heard of Des Moines in competition with Omaha.

"Q. Or any other Iowa town?"

"A. No, sir.

"Q. Do you know what the relative business of Fremont and Omaha are as compared with each other, say last year?"

"A. Fremont?"

"Q. Yes, sir.

"A. The relative business of Fremont, Lincoln, and Omaha? The business of Lincoln, from the best information I can get, is about one-fifth of that of Omaha. Fremont is probably about one-tenth.

"Q. Do you know what the wholesale business of Omaha amounted to during the last year?"

"A. The merchants' traffic amounted to something like forty millions of dollars.

"Q. Do you know what the manufacturing business amounted to?"

"A. Something like thirty millions of dollars.

"Mr. THURSTON:—

"Q. What is the relative business of Omaha and Chicago?"

"A. Omaha's business is probably, in merchandise, one-fifth of Chicago. That is an approximate figure. As a meat-packing centre we are the third in the United States.

"Q. Then, if Lincoln and Fremont have no rights against Omaha by reason of doing only one-fifth of the amount of business that Omaha does, why should Omaha have any equality with Chicago when the ratio between them is the same?"

"A. There is some place where you must draw the line, and the business of Omaha would seem to warrant that it had passed that line."

Robert Easson, another witness, testified to having been in the wholesale grocery business at Omaha nine or ten years. Formerly his house had rebates from the Chicago roads; but since the Interstate Commerce Law was passed, they had had none. The rates from Chicago to Omaha had not been diminished in consequence of the stoppage of the rebates. The result of the new rates was a loss of business at a good many competing towns or buying-points, and a necessity of selling in other cases at cost or with very little profit.

"At Grand Island, for instance. The rate from Chicago to

Grand Island was 55 cents, fourth class. The rate from Chicago to Omaha was 35 cents, and the rate from Omaha to Grand Island was 40 cents, making the rate from Chicago to Grand Island by Omaha 75 cents. This was 20 cents higher than the through-rate. The staple goods in our line are sold on very close margins, and these rates force us to sell at cost in many instances, or they force us to lose the business."

Charles A. Harvey and F. Colpetzer gave similar evidence regarding the lumber trade. Mr. Colpetzer testified as follows in regard to rebates:—

Question by Mr. WOOLWORTH: "Did you used to get rebates before the operation of the Interstate Law?"

"A. Yes, sir.

"Q. Have you ever got them since?"

"A. I have not.

"Q. Have the railroads reduced their charges here in consequence of taking away these rebates?"

"A. No, sir; the rates are higher from Chicago and elsewhere to Omaha than they were prior to the Interstate Law, and up to December they were higher than they have been for three or four years, and I think possibly five years. I think the present basis that is now in order is higher. The tariffs have been on the whole lower than they will be when they are restored again. They used to average about 16 cents; but, in addition to that, we received refunds. I do not believe that the lumber which was hauled into Omaha netted any road more on an average than 12 cents for the past three or four years, if they paid the agreed rebates.

"Q. Were these rebates allowed secretly, or were they notorious?"

"A. Secretly, certainly. The rebates or special rates were made to get the business.

"Q. Is it not an open secret that all large dealers got rebates?"

"A. Yes, I should think it would be."

Question by Mr. THURSTON: "You say these rebates were an open secret. You do not mean that the public knew what rebates your company were getting? You did not give it away, did you?"

"A. No, sir."

Allen T. Rector, in the wholesale hardware trade, testified to having formerly received rebates from the railroad companies, but these were discontinued March, 5, 1887. He produced a table of figures to show that the discrimination against Omaha was as alleged in the complaint, and, being asked why this discrimination should be made, replied, —

"The present fourth and fifth class rates in operation from

Chicago to Omaha are — 4th class, 30 cents, and 5th class, 35 cents. Take Edgar, Neb., for instance. That is a common point 100 miles west of Omaha, — a point tributary to Omaha. The fourth-class rate from Chicago to Edgar is 50 cents. Our fourth-class rate from Chicago to Omaha is 30 cents, and the fourth-class rate from Omaha to Edgar is 40 cents, making a discrimination against us of 20 cents.

“Q. And you don't know of any good reason for this discrimination?”

“A. No, sir, I cannot assign any good reason; I do not know any good reason for it.”

This statement of the salient points of the evidence will be sufficient for an understanding of its bearing upon the legal questions.

When the issues in this case were read, and the opening made, the questions presented seemed to be so nearly identical with those which were considered and passed upon in *Crews v. The Richmond & Danville Railroad Co.*, 32 Am. & Eng. R. R. Cas. 496; s. c., 1 Int. St. Com. Com. Rep. 401, that a comparison with that case was necessarily in the minds of the Commission and also of counsel, and continued to be so throughout the hearing. In the case mentioned, a claim was made on behalf of the city of Danville, Va., which was, to say the least, analogous to that here made on behalf of Omaha, and the Commission had been obliged to hold that it was not tenable. Danville claimed to be, and unquestionably was, a trade-centre of large importance, and it was insisted on its behalf that in making rates this fact should be recognized by the railroad company, and its trade with the towns naturally tributary to it protected. Taking a concrete case for illustration of the manner in which rates should be made to give this protection, it was claimed that the rates from Richmond to Danville, added to the rate from Danville to one of the smaller points beyond it on the same line, should not exceed the rate from Richmond direct to such smaller point, since, if it did, the rates would give Richmond, in respect to all merchandise coming from or beyond that city, an advantage over Danville in the competition with the trade of such smaller point, and this would amount to unlawful discrimination. The complaint in that case, as in this, directed the attention of the Commission specially to the competition between the trade-centres as the circumstance to be prominently kept in view in making rates, as if the question to be determined related exclusively to the large towns, though it was evident upon the face of the complaint that if the relief prayed for were granted, it must necessarily result in a large relative increase in the rates on long

Crews v.
Richmond &
D. R. Co.
examined.

hauls to the smaller towns as compared to the rates which would be charged to trade-centres.

In disposing of that case, the conclusion of the Commission, as summarized in the syllabus, was, that it was not a ground of complaint against a railroad company that it equalizes its rates as between small and large towns, even though the effect may be prejudicial to the large towns, which before had been specially favored. The spirit and purpose of the Act to regulate commerce requires that where the circumstances and conditions will fairly admit of it, the charges to all points for a like service should be made relatively equal; further, that a carrier is not compellable by law to give to merchants of a town on its line the privilege of shipping their goods from the point of purchase to their own locality, and again from thence to the place at which the goods may be sold by them at the same rate which would have been charged had there been but one shipment from the point of purchase to the point of ultimate delivery. The fact that a refusal to give the through-rate as for one shipment operates prejudicially to the town desiring the privilege, and favorably to another town, does not make the refusal operate as unjust discrimination when the carrier applies the same rule to all towns, and accords the privilege to none. Discrimination must consist in the doing for, or allowing to, one party or place what is denied to another; it cannot be predicated of action which in itself is impartial.

This is a short statement of what was decided in the Danville case, and the principles laid down seem to cover the case before us now. The relative position of Richmond and Danville as trade-centres for any purposes of the application of the contested principle was the same as is the relative position of Chicago and Omaha, and the question of protecting Danville in its jobbing trade was the same that is now raised for the protection of the jobbing trade of Omaha. The Omaha rates are not in themselves alleged to be excessive or unjust. The claim of the complainants is tersely stated in one of the arguments presented on their behalf, as follows:—

The principles of the Danville case govern the present case.

“We do not attempt at this time to say the rates in issue are too high or too low; that is not the question: it is the principle of their construction, and the disastrous results that follow, against which we are contending. This, and this alone, is the sum and substance of our complaint. Our presentations are surely sufficiently clear to avoid the possibility of misunderstanding. If the Chicago jobber can deliver his merchandise in Hastings, Neb. at a lesser cost for transportation than can his Omaha competitor, using the

Claim of complainants.

same Nebraska rails to the same destination, we think it proves beyond cavil that a preference is exhibited favoring the locality of Chicago to the detriment and disadvantage of Omaha."

This, with merely a change of names, is precisely what was claimed in the Danville case. The railroad company in making its rates had ignored the claims of trade-centres to special privileges, and made the rates to all the towns on its line proportional to distance, or nearly so, without distinguishing between those which claimed the distinction of being trade-centres and those which could set up no such claim. The Commission held that in doing this the carrier did not depart from the spirit and intent of the Act to regulate commerce. In its indirect effects its action undoubtedly benefited the more distant trade-centre in the competition with one nearer a point for the trade of which both were contending; but this was not an illegal consequence when it resulted from action which in itself was impartial as between all towns, large and small. The Danville case would therefore seem to be decisive of the case before us.

In the arguments presented on the hearing, however, an endeavor was made to point out a distinction between the cases, and in one of them the distinction was supposed to be found in this: that in the Danville case the rates complained of were made by the defendant road exclusively, and were to towns on its own line, while in this case the roads from Chicago to Omaha "do not confine themselves to nominating rates to the end of their lines, but by a species of commercial conspiracy unite with the Union Pacific and others in a policy establishing joint rates between their initial point and interior Nebraska points which has for its avowed object, among others, the building-up the jobbing and manufacturing interests of Chicago to our most serious hurt." As there is no proof of avowal of such an object as is here stated, we may pass that by without further notice, and say only of the distinction here relied upon, that it rests upon facts which in no way affect the principle.

If a rate when made by one company as a single rate would in law be unobjectionable, it would be equally so when made by several as a joint rate. The policy of the law and the convenience of business favor the making of joint rates; and the more completely the whole railroad system of the country can be treated as a unit, as if it were all under one management, the greater will be the benefit of its service to the public, and the less the liability to unfair exactions. All the joint rates from Chicago to interior points in Nebraska may therefore, for the purposes of this case, be tested

Same. Similarity to Danville case.

Distinction endeavored to be pointed out between the cases.

Joint rates. Principles by which to test.

by the same rules as if the lines were continuous and under one management. The uniting of the carriers in making them is not censurable unless the joint agreement is for the accomplishment of something unlawful or unjust in itself or in its consequences.

In a printed brief for complainants, filed with the Commission since the hearing, a different position is taken. In that brief, referring to the Danville case, it is said, —

“The Commission holds that, as between Danville considered as a competitive point, and local towns considered as non-competitive points, the former is not entitled to better rates than the latter. We accept that rule: we do not claim better rates for Omaha because it is a large town at which many lines centre, than are given to interior towns which are small and are located upon a single line. We go even farther, and admit that, laying out of view the size of the town and its location upon one or several railroads, one point should have as good rates as another, regard being had to circumstances. It is here that we make our complaint. We say that better rates are given from Chicago to interior, smaller, and non-competitive points than Omaha enjoys. We claim the converse of the rule laid down by the Commission in the Danville case. The Commission should not be betrayed into error by a discussion of the abstract rule of the sum of the two locals. Our contention does not compel us to defend that rule. We say the sum of two locals must not so far exceed the through-rate as to operate a discrimination. It thus appears that the claim in favor of competitive points, as such, made in the Danville case is not made by us, and what is said in the opinion on that point has no application here.”

Same. Position taken in complainants' brief.

And again: —

“What we contend for is, that the sum of two locals should not unreasonably exceed the through-rate. Let allowance be made for the greater trouble and expense of re-shipments, but you must not make the difference so great as to operate a discrimination. To illustrate: Take a rate from Chicago to Omaha of 50 cents, and a rate to Kearney, 200 miles farther west, of 51 cents, so that Omaha is shut out of and Chicago let into the trade at Kearney; there is a discrimination against Omaha which this Commission is organized to forbid.”

One difficulty with this is, that it does not harmonize either with the complaint or with the positions taken on the hearing. The complaint is planted distinctly on the claim that Omaha is discriminated against because the rates from Chicago to Omaha, added to the rates from thence to the interior Nebraska points, are greater than the rates from Chicago to such points direct. It was not

Distinction advanced is not in case.

conceded, but was inferentially denied, both in the complaint and on the argument, that they could be any greater and still be legal. The distinction which the brief attempts to make is therefore not in the case. But a further difficulty with it is, that no evidence was given in the case to support any such theory as the brief advances; and if it is admissible that "allowance be made for the greater trouble and expense of re-shipment," we are without evidence to show whether the difference in rates complained of is or is not, on this theory, too great. It would be impossible, therefore, to decide the case on this theory, even if the issue made would admit of it, which it does not.

We are constrained, therefore, to hold that the decision in the Danville case covers the one before us; and if that decision is adhered to, this complaint cannot be sustained. Nevertheless, this case has been pushed with earnestness and manifest sincerity. We have listened carefully to all that has been advanced, being not only willing but desirous to overrule the former decision, if satisfied that we have committed any error in making it. We shall, therefore, proceed to consider the case in the light of what was said on the hearing, for the purpose of satisfying ourselves whether any reasons exist for a change of opinion.

But, first, we must repeat here what in substance has already been said, — that this case cannot be regarded as one in which Omaha and Chicago are the business points exclusively interested. The case is very different from what it would be if that were the fact. The nature of the complaint is such, that the sixty-one interior Nebraska towns named in it are the real parties respondent in interest; while Chicago, though its interest may be large, is interested only incidentally, and because the rates made from Chicago and Omaha respectively to such interior towns enable the latter to obtain their goods from Chicago direct cheaper than they can obtain them from Chicago indirectly through the jobbing-houses of Omaha. The prayer of the petition can only be granted by increasing the rates from Chicago to such interior Nebraska towns, without increasing those to Omaha, or in some other way making a relative difference in rates as against such towns which does not now exist. The parties who would directly or immediately suffer in consequence would therefore be the towns whose rates would be thus relatively increased.

The justification which is advanced for this relative difference in rates is, that Omaha is a great distributing-point as Chicago is, and entitled as such to special rates. It had special rates in the form of rebates before the passage of the Act to regulate commerce, and

Reasons for
reconsidering
Danville case.

Omaha and
Chicago not
exclusively
interested.

Special rates to
Omaha as a
distributing
centre.

prospered upon them; but with the prohibition of rebates, and the giving to the interior towns as favorable rates as Omaha now obtains, the field of its operations is narrowed, and its business suffers, while Chicago reaps the benefit of its losses. Omaha, it is urged, is thus robbed of the advantages resulting from natural location and the enterprise of its citizens in building it up.

An obvious embarrassment in attempting to provide for and protect the claim made on behalf of trade-centres is, that it is impossible that there should be any general agreement as to the towns which can be regarded as such trade-centres. Difficulty in defining a trade-centre. Indeed, in the nature of things, it is quite out of the power of any one to point out any test by which we may classify those which are, and distinguish them from those which are not. The classification cannot be by size merely, for all trade-centres are at some period small; and if the classification is by amount of business, it will sometimes be found that a small town is, in some articles if not in all, doing a much larger jobbing business than another which is considerably greater. It often happens that a small town will have a large business in the manufacture and sale of some one article, and perhaps be as truly a trade-centre for that article as some other town ten or twenty times as great; but the small town which has begun a general jobbing-trade with the hope and prospect of a great growth is not likely to perceive any justice in being kept from the fulfilment of its hopes by competition being precluded through the more advantageous rates which are given to the larger town which it aspires to rival. If equal rates will enable it to compete, its business-men are very certain to think themselves wronged if they are not given such rates.

The difficulty in classifying towns as being or not being trade centres, or, as some of the witnesses phrase it, as being competitive or non-competitive, is made very plain in this case. The amended complaint assumes that none of the sixty-one interior points named is entitled to the privilege in rates which Omaha claims, or, in other words, is entitled to be considered a trade-centre. Same. Difficulty illustrated by present case. But Mr. Gibbon, a very intelligent witness for the complainants, concedes that Lincoln and Fremont are entitled to that privilege, and should have rates made to and from them on the same principle that Omaha seeks to establish on its own behalf. At the same time, he apparently thinks it would be absurd to concede the like privilege to Beatrice. But why would it be absurd? We have no evidence that Beatrice or Kearney, or other towns named in the complaint, are entirely without jobbing-trade. From our general knowledge of the country we can take notice, that, as compared

with Omaha, they are much smaller towns ; but we cannot know, unless informed by evidence, that they have not become, to some extent, centres of trade to still smaller towns about them ; and if the trade-centre theory were to be accepted and acted upon, it might become necessary to call upon the complainants to throw more light upon the case by evidence, and to put before us more distinctly their view of what constitutes a trade-centre, and at what stage in the growth of a prosperous Nebraska town it can claim privileges as such. Upon these subjects very little information was given on the hearing.

But a fatal difficulty with the theory that a trade-centre as such is entitled to specially favorable rates is found in the fact that it is in conflict with the spirit and purpose of the Act to regulate commerce. One of the reasons for the passage of that Act was, that, by means of rebates and other contrivances, large towns and heavy dealers secured advantages which gave them a practical monopoly of markets, and shut out the small towns and small dealers. Omaha dealers, as the evidence shows, formerly had rebates, and the business of the town prospered to some extent in consequence thereof. The rebates are now forbidden, and the rates are not so made as to secure to dealers the advantages which the rebates formerly gave. This the witnesses think a grievance ; but if it be one, it is very certain that it is not one which the law has empowered the Commission to correct. The law, in forbidding rebates in the interest of equality as between large towns and small, and large dealers and small, certainly did not intend that by any indirect action of any public authority this purpose of equality should be neutralized. All large towns, by reason of their being large, inevitably secure certain advantages in transportation. They get more roads, more trains, more agents and servants, to attend promptly to business demands, and will be more accommodated within the limits allowed by law, than will smaller towns ; but it does not lie within the power of this Commission to add to these advantages by compelling the carriers operating the lines which reach out from a great railroad centre to give to the large towns on their lines more favorable rates than they give to those which are smaller. The fact that under relatively equal rates one town, by reason of its situation, its size, the extent of its manufactures or trade, or for any other reason, secures the major part of the trade with the small towns, is not a fact which can empower this Commission to interfere. There may be great hardships in the situation, but those do not change the law. In contemplation of a law which was enacted in the interest of equality as between large and small interests, there can be no unjust discrimination in giving to large and small

Trade-centres
not entitled to
special rates
under Com-
merce Act.

towns relatively equal rates. It is not a matter of the least importance, in a legal sense, that the small towns are strictly local and non-competitive. If, under relatively equal rates, they can elevate themselves to the class of jobbing-towns, it is their right to do so ; but, if not, they are still entitled, as against any action of this Commission, to have the benefit of such favorable rates as do not unjustly discriminate against others.

A statement was made by Mr. Gibbon in his testimony, and was repeated on the argument in regard to the method of making rates, which requires some attention. It was assumed in both instances that these defendants, in making rates from Chicago to interior Nebraska points, made them on a different principle to that which was applied elsewhere. Mr. Gibbon in his testimony states how he understands the rates to be made from New York to the Missouri River ; and in the argument made on the hearing, and filed in writing with the Commission afterward, the same statement is in substance repeated, and is tersely summed up as follows : —

Statements as
to method of
making rates.

“ We have already shown the basis of construction of rates from the Atlantic seaboard to Omaha to be, for all practical purposes, the sum of the locals to Chicago added to the locals thence to the Missouri River.”

This statement, to say the least, is exceedingly inaccurate. The rates from the seaboard to Chicago are very far from being the sum of the locals. The Chicago rate is made as a through-rate, and, in making it, the locals are not taken as a measure. If the rates from the seaboard to the successive trade-centres, such as Albany, Buffalo, Detroit, and Chicago, were aggregated, the Chicago rate would be much greater than it is now : so the aggregate of the locals from Chicago to the Missouri River would be greater than the through-rate now given. Mr. Gibbon speaks of the through-rates from New York to Chicago and from Chicago to the Missouri River as two locals ; and his position is, that, as the rate from New York to the Missouri River is made up of the sum of these two locals, so the rate from Chicago to the interior Nebraska towns should be made up of the sum of the two locals, — first from Chicago to Omaha, and then from Omaha to the interior town. But this reasoning is on a purely arbitrary basis. The rate from New York to Chicago is not a local at all, but is in the strictest sense a through-rate, and in making it, as is stated above, the great intermediate trade-centres are disregarded. It is certainly in entire harmony with the method in which the Chicago rate is made by the roads reaching out from New York, that the rate from Chicago to Lincoln, Fremont, or any other town of corresponding importance should be made as a through-

rate, taking no notice of intervening towns in making it; but if the method of rates from New York is examined farther, it will be found that not only are single through-rates made to Chicago and to other great centres, but they are also made to small towns and insignificant stations in Ohio, Indiana, Michigan, and Illinois, and, indeed, generally through the country; so that the practice of the defendant roads in making rates from Chicago to towns in Nebraska, large or small, as single rates, instead of being exceptional and peculiar, is in accordance with the practice generally prevailing.

In making use of the term "through-rate" in respect to the rates from the seaboard to Chicago, and from Chicago to Omaha,

we have done so without undertaking to indicate by definition the distinction between what rates should be called through and local respectively. The needs of this case do not call for such definition. To give some idea of how these rates are made, and how they

Through-rates.
Illustrations of
how they are
made.

would compare with rates where the hauls are shorter, we give here the rates by the Pennsylvania from New York to Chicago, and also to important towns on its line before Chicago is reached, with the distances from New York respectively; the rates being on merchandise in the first class:—

	Distance.	Rate.
To Trenton	56 miles.	.25
Harrisburg	195 "	.33
Pittsburgh	444 "	.45
Chicago	912 "	.75

We also give a like table of rates from Chicago on the Chicago & North-western:—

	Distance.	Rate.
To Sterling	110 miles.	.30
Clinton	138 "	.40
Cedar Rapids	219 "	.50
Omaha	492 "	.75

The points taken in each case are important points, and it is seen at a glance how the rates to Chicago and Omaha respectively are diminished with the distance, as compared with the rates to the other towns, and how inappropriate would be the designation of "local" as applied to them. A still more striking table would be presented if the comparison were made with rates from station to station along the lines of these roads. Taking the rates on the Chicago & North-western, for example, we find that the sum of four locals for 20 miles each might exceed the rate for the whole 492 miles to Omaha, so that the carrier may receive more for transporting a like kind of freight 80 miles in four consignments than for transporting it 492 miles in one

consignment. But the four would be purely local, and the one a through shipment. These instances distinguish broadly between what is local and what is through freight, and they leave no question as to what term should be applied in the case before us. Purely local rates are those which are made from station to station, and with some approximation to distance; and though the term may be, and frequently is, applied more broadly, it is never in railroad circles or railroad literature made use of in connection with rates for long distances, which are made in disregard of rates to and from numerous intermediate stations.

**Distinctions
between the
local and
through
freight.**

But the arbitrary basis of the reasoning in support of the complaint on this branch of the case is manifest from another consideration; namely, that it has no force whatever except upon a concession of superior rights to Omaha as against other Nebraska towns. In the argument filed it is said, —

**Superior rights
of Omaha as
against other
Nebraska
towns.**

“We respectfully submit that if rates from Chicago on all classes of merchandise to interior Nebraska points be made on the basis of the sum of the locals, it will be entirely consistent with the mode of construction obtaining from the Atlantic seaboard to the Missouri River, will equalize our advantages, so far as figures are concerned, with Chicago, and place every town in our State on a perfect plane of equality as to rates.”

Now, as already stated, the rates from Chicago to Omaha are not the sum of the locals. If they were, as, for example, if the Chicago & North-western were to make the Omaha rates the sum of the rates from Chicago to Clinton and from Clinton to Omaha, they would be considerably above what they are now. What this carrier does, however, is to make a through-rate, disregarding the intermediate rates in doing so: there is no sum of rates about it. It does precisely the same in making the rate to Lincoln, to Fremont, to Blue Springs, and to all the other towns named; in this respect it treats them all alike. As it does not add together locals in making the rate to Omaha, neither does it in making the rate to the interior Nebraska towns. This certainly is not illegal unless Omaha has in law some right to consideration in the making of rates superior to that of other Nebraska towns. In the argument, as above quoted, it is assumed that it has; for when it speaks of placing “every town in our State on a perfect plane of equality as to rates,” Omaha is by implication excluded as the one town which by its size, its importance, and the extent and nature of its business, is entitled to have its advantages equalized with those of Chicago, instead of being put on a plane of equality in rates with the others. We

are compelled to say that the law does not confer upon the Commission the power thus to equalize the advantages of commercial centres.

We have no occasion at this time to inquire how generally it is true that the rates from the seaboard to towns west of

Rates from
seaboard to
towns west of
Chicago. Chicago are made up of the rates to Chicago added to the local from Chicago to the point of destination.

When any question respecting such rates, or rates in any other part of the country, is presented to the Commission, and the principles stated in this opinion are found to be applicable, they will be applied without hesitation, in the belief that they are just and right, and that they conform to the spirit of the Act to regulate commerce.

The conclusions of the Commission may be summed up in very few words : —

Conclusions of
Commission
summed up. *First*, The objection taken in one of the answers to the institution of proceedings by the freight bureau of the Omaha board of trade is not sustained.

The case of *The Vermont State Grange v. The Boston & Lowell Railroad Company* (31 Am. and Eng. Corp. Cas. 654 ; s. c., 1 Inter. St. Com. Com. Rep. 158) is sufficient authority for this ruling.

Second, We find the facts constituting the alleged ground of grievances to be as set forth in the complaint and amended complaint respectively.

Third, Those facts do not make out a case of unlawful discrimination by the defendant carriers as against the city of Omaha, or show that that city is subjected to undue or unreasonable prejudice within the meaning of the third section of the Act to regulate commerce.

Fourth, The complaint must therefore be held not sustained.

See *Crews v. Richmond & D. R. Co.*, 32 Am. and Eng. R. R. Cas. 496.

Aggregate Charge Less in Proportion every Hundred Miles after the First. — Joint Rates on Long Hauls Lower than Local Rates on Short Hauls. — In *Farrar & Co. v. East Tenn., Va. & Ga. R. Co.*, 1 Inter St. Com. Com. Rep. 480, the Commission, Bragg, C., writing the opinion, in holding that the local rates from Dalton, Ga., to Knoxville, Johnson City, and Bristol, on lumber, are not shown to be unreasonable, but that the joint rates on lumber from Dalton to Roanoke and Lynchburg are shown to be unreasonable, also hold that, as a rule in the transportation of freight by railroads, while the aggregate charge is continually increasing the farther the freight is carried, the rate per ton per mile is constantly growing less all the time, making the aggregate charge less in proportion every hundred miles after the first, arising out of the character and nature of the service performed, and the cost of the service; and thus staple commodities and merchandise are enabled to bear the charges of this mode of transportation from and to the most distant portions of the country. The Act to regulate commerce, so far from throwing hampering restrictions or obstacles in the way of the operation of this salutary rule, gives it all the

benefit and aid of its sanction and safeguards by providing that the carrier shall be entitled to receive a reasonable compensation for the service performed upon open published rates, against which no competitor can take advantage by allowing shippers secret rebates and drawbacks in order to get the business.

In the nature of things, joint rates on long hauls usually are, and as a rule should be, lower in proportion to distance than local rates on short hauls of the same commodity.

Rule of the Commission in Reference to Applications for Rehearings. — The Commission will promptly and carefully examine an application for a rehearing with a view to the immediate correction of any error of law or fact found to exist, but will not direct a rehearing involving the expense to parties of appearing before the Commission for a re-argument, unless satisfied that such re-argument might have the effect of changing the result of what the Commission has already done. The statute is construed as dealing with the substance of things, and as contemplating, as far as this is possible, methods of procedure that are speedy, and which come at once to the very right of questions arising in the transportation of persons and freight. *Riddle, Dean, & Co. v. Pittsburgh & L. E. R. Co.*, 1 Inter St. Com. Com. Rep. 490.

When Carrier should be made a Party to Proceedings. — Where the relation of any carrier to the matter complained of is such that it is, in whole or in part, materially responsible for the alleged grievance, and has direct interest in any investigation of the subject-matter involved, and the merits of the controversy cannot be investigated and determined in the absence of such carrier as a party, then that carrier should be made a party to the proceeding; and, if not a party, no relief can be had against it. *Riddle, Dean, & Co. v. Pittsburgh & L. E. R. Co.*, 1 Inter St. Com. Com. Rep. 490.

HECK & PETREE

v.

EAST TENNESSEE, VIRGINIA, & GEORGIA R. Co. *et al.*

(*Interstate Commerce Commission, Feb. 15, 1888.*)

Roads Subject to Act to regulate Commerce. — A railroad company chartered by the State of Tennessee owns a short road wholly in that State, but has never owned any rolling-stock, nor operated its road. The road was used and operated as a means of conducting interstate traffic in coal by companies owning connecting interstate roads. *Held*, that the short road thus used is one of the facilities and instrumentalities of interstate commerce, and the carriers using it are subject to the provisions of the Act to regulate commerce. In respect to such traffic, the duties of such carriers to the public are the same without respect to ownership, corporate control, the authority or means of its construction.

Same. — As One of the "Instrumentalities of Shipment or Carriage," it must be accessible to all interstate shippers on equal and reasonable terms. The public cannot be deprived of this right by the separate or joint action of the carriers, and they cannot be permitted to use it for purposes of discrimination between mine-owners on its line.

The Claim for Pecuniary Damages presents a case at common law in which defendants are entitled to a jury trial.

Messrs. *Webb & McClung* and *S. F. Phillips* for petitioners.

W. M. Baxter and *E. M. Johnson* for defendants East Tennessee, Virginia, & Georgia R. Co., and Knoxville & Ohio R. Co.

J. T. Worthington for defendants Richmond & Danville R. Co. and Richmond & West Point Terminal Warehouse Co.

E. R. Chapman for defendants Coal Creek & New River R. Co.

MORRISON, Commissioner. — The complaint against the defendants is, that on April 15, 1887, and continually since then, they refused to transport coal which up to that time they had transported for the complainants from their mines in the Coal Creek coal-field, in the State of Tennessee, to their customers in North Carolina and other States; that, while so refusing to carry complainants' coal, the defendants carried and continued to carry coal from said coal-field since April 15, 1887, as they did before, for other miners and shippers; that, in respect of the traffic in coal, the defendants unjustly discriminate against the complainants, and refuse to afford them the reasonable and equal advantages for forwarding coal afforded to others. Complainants ask that their rights as shippers of coal may be secured to them by order of this Commission, and that large pecuniary damages may be awarded to them which they claim for their alleged losses by non-shipment of their coal.

The Coal Creek & New River Railroad Company, answering separately, denies that it discriminates unjustly or at all against the complainants; denies that it refused to afford them any facilities afforded to other shippers of coal on the line of defendant's road; and denies that it refused the use of its track to the plaintiffs by the stoppage of the running thereon of engines and cars of other companies, except by general refusal which applied to any and all use of its road or track. It alleges that any use of said track subsequent to such general refusal has been under an arrangement open alike to all shippers, and that no application has been made by complainants for any arrangement.

The East Tennessee, Virginia, & Georgia Railway Company, and the Knoxville & Ohio Railroad Company, two of the defendant companies, jointly answering, deny the existence of any facts which give the right to or make it the duty of said last-named company to operate the road of said Coal Creek & New River Company as against its consent and express orders; deny that they or either of them have ever managed or controlled said Coal Creek & New River road, or run cars or engines over it at any time, except by its acquiescence and authority. They aver that, subject to such acquiescence, the Knoxville & Ohio Railroad Company heretofore ran its engines and cars, and engines and

cars under its control, over the line of said Coal Creek & New River road to accommodate coal-miners on the line thereof, for which service a switching charge was made; that such service was discontinued on all of its road by order of said Coal Creek & New River Company, and with its authority and acquiescence restored on so much of its road as extends to the mine of the Excelsior Coal Company, and within one-fourth mile of complainants' mine. And, except as above stated, these defendants deny every other allegation of complainants, and deny jurisdiction of the Commission to entertain the complaint.

The other defendants, the Richmond & Danville Railroad Company and the Richmond & West Point Terminal and Warehouse Company, each for itself makes general denial of all that is alleged against them or either of them in the complaint which on the hearing is, by consent of parties, dismissed as to the two defendants last named.

From the testimony of witness and the uncontroverted statements made in the complaint and answers thereto, the facts are found to be as follows:—

The complainants, under the firm name of Heck & Petree, were, from Jan. 1, 1886, to April 15, 1887, engaged in mining and selling coal in the Coal Creek coal-field in Anderson and Campbell Counties, in the State of Tennessee, and in shipping coal from said coal-field over the roads of defendants to markets and customers in North Carolina and other States. On and after April 15, 1887, said railroad companies refused to take or ship over their roads any coal of said firm.

The mine of said firm is one of several mines located on the line of the Coal Creek & New River Railroad Company's road, and coal shipped from the mine of said firm to market must be carried over said last-named road to the Knoxville & Ohio road, over it to its junction at Knoxville with the East Tennessee, Virginia, & Georgia road, over said last-named road and its connections to the place of destination. The only outlet or means of reaching markets for coal mined in said Coal Creek coal-field is over the line of the Knoxville & Ohio Railroad.

The Coal Creek & New River Railroad Company is a corporation chartered by the State of Tennessee. It owns a road or track three miles long, but never owned cars or other rolling-stock, nor operated its road. The rolling-stock used on its road was and is owned by the Knoxville & Ohio Railroad Company, which has done all the carrying done on said Coal Creek & New River road from the time it was built in 1880-81 up to April 15, 1887, when carrying on it was refused for complainants, but continued for other shippers.

A formal order was issued by the Knoxville & Ohio River Railroad Company discontinuing and forbidding further operations on the Coal Creek & New River Railroad on and after April 15, 1887. Operations by said Knoxville & Ohio Railroad Company were soon thereafter renewed on that part of said road extending to the Excelsior coal-mine and within one-fourth of a mile of complainants' mine, and occasional transfers were made over the entire road; but all transportation was refused to complainants, who had orders for large quantities of coal, which they offered for shipment over defendants' roads.

The East Tennessee, Virginia, & Georgia Railway Company and the Knoxville & Ohio Railroad Company are separate corporations, but their roads are part of the same system, and are under substantially the same management. The former owns more than half of the capital stock of the latter, and the latter owns nearly one-half the capital stock, and (together with parties interested in its own road) owns a controlling interest in the capital stock of the Coal Creek & New River Railroad Company. The three companies were and are in accord, and have acted in concert in the refusal to carry complainants' coal on the fifteenth day of April, 1887, and from then until now.

The Knoxville & Ohio road extends from its junction with the East Tennessee, Virginia, & Georgia road at Knoxville northwardly to the Kentucky State line, and reaches said coal-field at Coal Creek station, from which a "Y"-shaped switch extends into said coal-field, and connects with said Coal Creek & New River road.

Said coal-field is about eight miles in extent along the face of Cumberland Mountain fronting to the south-east. A large and considerable tract in the north-east part of said coal-field is, and was before said Coal Creek & New River Railroad was built, owned by John M. Heck, lessor of complainants, while another large tract farther to the north-east was owned by said John M. Heck and the Knoxville & Ohio Railroad Company jointly. The south-west part of said coal-field is owned by other proprietors, among them some of the officers and persons interested in the defendants' roads.

The "Y" switch from Coal Creek station did not and does not so extend into said coal-field as to reach the part owned by said John M. Heck, and the said Coal Creek & New River road was built by the Knoxville & Ohio Railroad Company and said Heck from said switch to and along that part of said coal-field owned by said John M. Heck, thence to and along the part owned jointly by him and Knoxville & Ohio Railroad Company.

John M. Heck was president of the Coal Creek & New River Railroad Company from the time its road was built up, to October, 1886, when he was succeeded by E. R. Chapman.

When Heck had been superseded, it was claimed by the stockholders and others interested in the defendant companies that during his presidency he had used said road, and allowed his lessees to use it, without paying or causing to be paid any thing to said company for such use of its road. The action taken by the defendants in respect of the refusal to transport the coal of said firm was taken to force said John M. Heck to a settlement with said company by hindering his lessees in their mining operations.

On these ascertained facts it is insisted on behalf of the Coal Creek & New River Railroad Company that it is not a common carrier, and that its road is not any part of a line for continuous carriage from one State or Territory to another State or Territory.

Contention of
Coal Creek
road.

This view is apparently based on the fact that the road of this company is wholly in the State of Tennessee, from which the company derives its corporate existence; that it owns no engine or cars, has not operated, and does not of itself operate, its road.

It is true that coal taken over its road has been drawn by the engines and carried in the cars of the other defendants; but for all practical purposes the road of this defendant is as much a part of the continuous line over which coal from plaintiffs' mine goes to market as is the "Y" switch which connects this road with the roads of the other defendant companies. In the history of its construction and of its use, it was always treated as a part of the continuous line, and one of the instrumentalities by which the coal from this mine in Tennessee was expected to reach and did reach the markets in the other States.

The road is
part of a con-
tinuous line.

If this road is one of the means by which commerce in coal is carried on between Tennessee and other States as an instrumentality of interstate commerce, its duties to the public under the Act to regulate commerce in respect to such traffic are the same, without respect to its ownership, corporate control, the authority or means of its construction.

By the first section of the Act to regulate commerce, the term "railroad" is made to include "all the road in use by any corporation operating a railroad, whether owned or operated under contract, agreement, or lease;" and the term "transportation" is made to include "all instrumentalities of shipment or carriage."

Meaning of
railroad as
used in Act.

This road has been operated by the Knoxville & Ohio Company from the time it was built. This has been done, as alleged in defendants' answer, by agreement or contract, since April 14, 1887. Presumably it was so done *before*. This would seem to

Road part of
Knoxville &
Ohio line.

bring this road within the reason of the provisions of the Act to regulate commerce relating to lines for continuous carriage from a State or Territory to another State or Territory, and make it, in connection with the roads of the other defendants, a part of such a line.

Yet, in the view we take of this case, the relief asked by complainants is not dependent upon this Coal Creek & New River Company being a common carrier, or upon its road being a part of a line for continuous carriage to other States.

Whatever else this road may or may not be, it is one of the means and facilities for shipment to and over lines from complainants' and other mines in Tennessee to market in

Same. Used in
interstate
commerce.

other States. It is one of the "instrumentalities of shipment or carriage" included in the term "transportation," to which the Act to regulate commerce applies. As such it must be open and accessible alike to all shippers, and on equal and reasonable terms. This is a right belonging to the public, of which it cannot be deprived by the separate act or control of any one of the defendants, nor by the act of any or all of them combined.

The other defendant companies insist that they have no control over the Coal Creek & New River Company, and deny

Position of
other defend-
ant companies.

that they have any legal right to operate, or owe any duty to the public which requires them, or either of them, to operate, its road without the consent and against the express orders of said Coal Creek & New River Company. Neither denying nor admitting their legal obligation to do so, they aver readiness to carry coal over said road with the acquiescence of the said New River Company, which acquiescence they claim to have had in all the carrying done over its road. This road is included in the term "railroad" or the term "transportation," or both, as defined in the Act to regulate commerce; when the defendants are permitted to make use of and to control it for their own purposes, they have no legal right, in doing so, to refuse impartial accommodation. That such refusal would subject it to responsibility to the State laws is not questioned; and whether the company, as owner of the road, would be subject to the jurisdiction of this Commission, is therefore not important. The East Tennessee, Virginia, & Georgia Company operating its own line and the line of the

Knoxville & Ohio Company, is an interstate road, and the traffic in question is interstate traffic; this short road is made use of by the other roads as a mere facility to such traffic. They cannot be permitted to make use of it, or any part of it, for the purposes of discrimination as between the mine-owners upon it. The attempt to shelter themselves behind the action of the owners of the short road is but a pretence. The interstate roads control the other, and they cannot be allowed to abuse that control to oppress the public or any part of it.

The "Y" switch to the coal-field did not and does not extend as far up as the mine of complainants on the coal lands owned by the lessor, separately or jointly, with the defendants' Knoxville & Ohio Company. To reach these lands, their owners, Heck and the Knoxville & Ohio Railroad Company, built the New River road, Previous to October, 1886, Heck was president of the New River Company. The Knoxville & Ohio Company operated the Coal Creek & New River Company's road until April 15, 1887, for all shippers, and since then for all except complainants. Since it was built, new mines have been opened and investments made for the development of mines, in view of the transportation which this road afforded, and of which it is a necessary part. It is neither good faith nor legally right to deny its use to the sole purpose of its construction.

Denying use of Coal Creek road to purpose of construction.

The misunderstanding and disagreement between Heck and the stockholders or others interested in the defendants' roads has furnished a pretext for, but does not justify, the illegal act of defendants in refusing to transport the coal of complainants, which was done to bring Heck to terms. The public, of which the complaining firm is a part, cannot wait for its rights while stockholders or persons interested in the defendant companies adjust their accounts or settle their differences.

Disagreement between Heck and stockholders no excuse.

The complainants and other miners on the line of said Coal Creek & New River road, are entitled to have their coal carried over it to its connecting road, and thence to destination.

Claim for pecuniary damages.

The claim for pecuniary damages made by complainants was not entertained on the hearing because it presents a case at common law in which the defendants are entitled to a jury trial.

It is therefore found that the conduct of the defendants in failing and refusing to receive coal for interstate transportation when tendered by complainants, was in contravention of the provisions of the Act to regulate commerce; and it is ordered that said defendants and each of

Finding of Commission.

them forthwith cease and desist from such failure and refusal, and henceforward receive and forward coal when so offered for transportation on any part of the line of said Coal Creek & New River Railroad upon just, reasonable, and equal terms.

To what Carriers Interstate Commerce Act applies. — See *Ex parte* Koehler, 30 Am. & Eng. R. R. Cas. 71; *Re* Express Companies, 32 Ib. 567.

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NOTE. — The mode of citing the American and English Railroad Cases is as follows :

33 Am. & Eng. R. R. Cas.

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Assignment. A party to whom the contract for the purchase of a line of railroad is assigned, by accepting the conveyance takes upon itself the fulfilment of the contract, and is estopped to deny the consent of its assignor to the substitution. *Texas & W. R. Co. v. Gentry* (Tex.). 46.

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TRESPASS.

Definition. Trespass is an unlawful act committed with violence on the property or rights of another. An action of trespass is that which is instituted for the recovery of damages for a wrong committed with immediate force. *St. Julien v. Morgan's Louisiana T. R. Co (La.)*. 92.

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Land-owner is not debarred of his action for compensatory damages for unauthorized occupation of land if instituted at the domicile of the company. *St. Julien v. Morgan's Louisiana T. R. Co (La.)*. 92.

Trespass. Immunity of railroad from suit elsewhere than at its domicile for causes of action other than trespass refers to action of tort for wrong committed and unlawful entry upon lands of citizens *vi et armis*. *St. Julien v. Morgan's Louisiana T. R. Co. (La.)*. 92.

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